Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CAROLYN BINNS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Arkansas Supreme Court denied Petitioner's rights to due process under the Fourteenth Amendment of the United States Constitution by allowing a Justice to participate in the decision of her case while having a disqualifying interest associated with the adverse party.

2. Whether the Arkansas Supreme Court has failed to follow the precedent of the United States Supreme Court, as set forth in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 815 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), by summarily dismissing Petitioner's Petition for Vacatur.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

(a) Petitioner: Carolyn Binns, a citizen of the State of Arkansas.

(b) Respondent: Wal-Mart Stores, Inc., a corporation organized under the laws of the State of Delaware.

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(a) Per curiam Order of November 2, 2000, of the Supreme Court of Arkansas denying Petitioner's Petition for Vacatur and Supplement to Petition for Vacatur, first reported in the Arkansas Advance Reports at Volume 342, No. 9, and not designated for future publication. (Appx. 1a).

(b) Per curiam Order of June 1, 2000, of the Supreme Court of Arkansas denying Petitioner's Petition for Rehearing, first reported in the Arkansas Advance Reports, Volume 341, No. 8, and not designated for future publication. (Appx. 1b).

(c) *Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000). (Appx. 1c).

JURISDICTIONAL STATEMENT

The Judgment of the Arkansas Supreme Court in the original appeal was entered on April 27, 2000. Petitioner's Petition for Rehearing was denied on June 1, 2000. The Arkansas Supreme Court denied Petitioner's Petition for Vacatur on November 2, 2000. This Petition is timely filed pursuant to Supreme Court Rule 13.1. The Supreme Court's jurisdiction to review this Writ of Certiorari is pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

(a) Amendment XIV, Section 1, Constitution of the United States of America:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) Article VII, § 20, Constitution of Arkansas:

> No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court.

(c) 28 U.S.C. § 455:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

APPENDIX A

LAW OF CHANCERY MANDATE

STATE OF ARKANSAS,)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on November 2, 2000, amongst others were the following proceedings, to-wit:

99 00810

Wal-Mart Stores, Inc.

Appellant(s)

vs. Appeal from Drew Circuit-CIV-96-6-3

Carolyn Binns

Appellee(s)

Appellee's petition for vacatur and supplement to petition for vacatur is denied. Corbin, Imber, and Smith, JJ., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 2nd day of November, 2000.

/s/ Leslie N. Stien
Clerk

By: /s/ Login Horne D.C.

Original to Clerk
cc: James Leon Holmes
Steven W. Quattlebaum
Thomas G. Williams
Hani Wail Hashem
Sara M. Sawyer-Hartness
Johnson D. Ogles
Morgan Welch
Hon. Jerry E. Mazzanti

APPENDIX B

Office of the Clerk
Supreme Court of the State of Arkansas
[Names and Addresses Omitted in Printing]

June 1, 2000

John Ogles
Attorney at Law
P.O. Box 891
Jacksonville, AR 72076

Morgan E. Welch
Attorney at Law
226 E. Markham St., Suite 200
Little Rock, AR 72201

RE: 99-810 Wal-Mart Stores, Inc. v. Carolyn Binns

Gentlemen:

The Supreme Court made the following orders in the above styled case today:

"Petition for rehearing is denied. Glaze and Brown, JJ., would grant. Corbin, Imber, and Smith, JJ., not participating. (Special Justices appointed.)"

"Motion of the Arkansas Trial Lawyers Association to file amicus curiae brief in support of appellee's petition rehearing is granted. Corbin, Imber, and Smith, JJ., not participating."

Sincerely,

/s/ Leslie W. Steen, Clerk
Leslie W. Steen, Clerk

LWS:rh

cc: Hani W. Hashem
Sara Sawyer
Leon Holmes, Thomas G. Williams
& Steven W. Quattlebaum
Kay Craig, Clerk (#CIV-96-6-3)

APPENDIX C

WAL-MART STORES, INC. *v.* Carolyn BINNS

99-810

Supreme Court of Arkansas
Opinion delivered April 27, 2000

Appeal from Drew Circuit Court; *Joe Mazzanti*, Judge; reversed.

Williams & Anderson, LLP, by: *Leon Holmes* and *Steven W. Quattlebaum*, for appellant.

Gibson & Hashem, P.L.C., by: *Hani W. Hashem; Sara Sawyer*, and *Ogles Law Firm*, by: *John Ogles*, for appellee.

W.H. "Dub" Arnold, Chief Justice. Appellant, Wal-Mart Stores, Inc., appeals from a circuit-court judgment, based upon a jury verdict, awarding appellee, Carolyn Binns, $750,000.00 in compensatory damages and $2,000,000.00 in punitive damages relating to Binns's abuse-of-process and malicious-prosecution claims against Wal-Mart. On appeal, Wal-Mart contends that the circuit court erred by failing to direct verdicts on both claims because Binns failed to prove (1) the essential elements of the tort of abuse of process, and (2) the elements of the tort of malicious prosecution, namely, lack of probable cause and malice. Additionally, Wal-Mart argues that Binns was erroneously awarded punitive damages based upon a lesser degree of *scienter* than was required for the underlying tort. Although the appeal was originally filed in the Court of Appeals, we granted appellant's request for supreme-court jurisdiction and accepted the case to consider a significant issue needing clarification or development of the law. Our jurisdiction is authorized pursuant to Ark. Sup. Ct. R. 1-2(b)(5) (1999).

After considering the issues on appeal, we find merit in appellant's arguments. Accordingly, we hold that the circuit court erred by failing to direct verdicts on the abuse-of-process and malicious-prosecution claims, and we reverse the award of punitive damages.

Background

Carolyn Binns was an employee in the Monticello, Arkansas, Wal-Mart lay-away department. David Craig and Tim Langley, two of Wal-Mart's managers, suspected Binns of theft through falsification of computer cash-register entries. In support of management's belief that Binns had taken money from the registers, Wal-Mart points to the following facts: (1) on numerous occasions Binns canceled the final payment on a lay-away account shortly after a customer paid off the account and received the merchandise; (2) the register cash reports failed to show an "overage" when Binns performed this function; (3) Craig and Langley believed that the cash reports should have shown an overage in that situation; and (4) no other Wal-Mart employee performed the function Binns performed.

Following an internal investigation and questioning of Binns, Langley called the Monticello Police Department and reported the results of Wal-Mart's investigation. Detective Charles Cater continued the investigation at the Wal-Mart store and, according to Langley, reviewed the entire file compiled by management, including detail tapes, cash reports, Langley's notes, and payroll archives, that reflected the cancellation of final lay-away payments and the fact that the cash drawer was not "over" on the

days on which these lay-away payments were canceled. Detective Cater copied some portion of the file and sought an arrest warrant for Binns. Following a probable-cause hearing, a warrant was issued for Binns's arrest. However, approximately one year later, the prosecuting attorney *nolle prossed* the charges against Binns, apparently based upon insufficient evidence. Subsequently, Binns filed an action against Wal-Mart for negligent prosecution, abuse of process, and malicious prosecution. Although the circuit court granted Wal-Mart summary judgment on the negligent-prosecution claim, a jury ultimately returned a verdict in Binns's favor on the remaining claims.

Appellee's principal witness at trial was Kevin Parker, a former Wal-Mart assistant manager at the Monticello store while David Craig was manager. Parker testified as an expert witness regarding procedures Wal-Mart employees should follow in a theft investigation. He also tendered his opinion as to what cash reports and computer records would reveal when a final lay-away account payment was made, canceled, and money remained in the cash drawer. Significantly, Parker acknowledged that management believed they had probable cause to bring charges against Carolyn Binns. Moreover, he testified that, based upon his review of the evidence and his personal knowledge of Craig, there was no ill will, spite, hatred, or spirit of revenge at work.

Wal-Mart timely moved for directed verdicts on both the abuse-of-process and malicious-prosecution counts. In response, Binns argued that based upon Kevin Parker's testimony, probable cause did not exist for her

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings

association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(d) Arkansas Code of Judicial Conduct, Canon 3E:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) Arkansas Code of Judicial Conduct, Canon 2(a):

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

STATEMENT OF THE CASE

The Constitutional issues involved in this matter present a question regarding disqualification of an appellate judge. The Petitioner, Carolyn Binns was a long-time employee of Respondent, Wal-Mart Stores, Inc. (hereinafter Wal-Mart). Petitioner was accused of embezzling funds from Wal-Mart and criminally prosecuted based upon information supplied by Wal-Mart to the Prosecuting Attorney. Prior to trial, the Prosecuting Attorney dismissed the criminal proceeding, citing a lack of evidence to support Wal-Mart's contentions. Petitioner then filed a civil action against Wal-Mart, based upon the causes of action of malicious prosecution and abuse of process. After jury trial, Petitioner was awarded Judgment against Wal-Mart for $750,000.00 in compensatory damages and $2,000,000.00 in punitive damages. An appeal was docketed by Wal-Mart in the Arkansas Court of Appeals.

Upon the Motion of Wal-Mart, the Arkansas Supreme Court assumed jurisdiction of the appeal.

Shortly after the transcript was docketed with the Arkansas Supreme Court, two Justices of the Arkansas Supreme Court disqualified themselves from participating in the decision on appeal. Under the unique procedure used in Arkansas, the Governor was required to appoint Special Justices from the role of practicing attorneys to fill the positions of the two Supreme Court Justices who had disqualified themselves. The Honorable W. H. "Sonny" Dillahunty and JoAnn Coniglio Fleischaier were appointed as Special Associate Justices to hear the appeal. On the morning of Oral Arguments, an additional Justice, Lavenski Smith, disqualified himself, without warning, leaving only four Justices of the Arkansas Supreme Court and two Special Associate Justices appointed by the Governor to decide the case.

On April 27, 2000, the Arkansas Supreme Court issued its Opinion, reversing the Judgment in favor of Petitioner, and directing a verdict for Wal-Mart on appeal. Two Arkansas Supreme Court Justices and both Special Associate Justices formed the majority in deciding the case. A vigorous dissent was filed by two Arkansas Supreme Court Justices. *See Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000). (Appx. 1c). A timely Petition for Rehearing was filed and denied by Per Curiam Order of the Arkansas Supreme Court. (Appx. 1b).

After the appellate process had been completed, Petitioner learned information regarding the disqualifying interest of Special Associate Justice Fleischaier. Special Associate Justice Fleischaier was at all times relevant

hereto, and continues to be, a partner in the litigation section of Friday, Eldredge & Clark Law Firm, Little Rock, Arkansas. At all times relevant to the appellate process, the litigation section of Friday, Eldredge & Clark Law Firm represented Wal-Mart in at least two significant litigation matters: *Ronald Hughes v. Wal-Mart Stores, Inc.*, No. LR-C-98-552, United States District Court for the Eastern District of Arkansas, currently on appeal to the Eighth Circuit Court of Appeals; and, *Steve Moore v. Wal-Mart Stores, Inc. and Llama-Gabilondo Y Cia, S.A.*, Circuit Court of Crawford County, Arkansas, CIV-97-172.

Kevin A. Crass, a partner in the litigation section of Friday, Eldredge & Clark Law Firm, filed numerous pleadings representing himself as the attorney for Wal-Mart in the *Ronald Hughes* case. Wal-Mart is the only named defendant. Mr. Crass filed an Answer on behalf of Wal-Mart. (Appx. 21e). Mr. Crass filed a Motion for Summary Judgment on behalf of Wal-Mart. (Appx. 25e). Mr. Crass sought a continuance, representing himself as Wal-Mart's "counsel of its choice in this case." (Appx. 30e). Summary Judgment was entered in favor of Wal-Mart on February 22, 2000 and the Plaintiff Hughes appealed to the Eighth Circuit Court of Appeals. Mr. Crass continues to represent Wal-Mart in the appellate process before the Eighth Circuit Court of Appeals at this time. William M. Griffin, III, also a partner in the litigation section of Friday, Eldredge & Clark Law Firm, represented Wal-Mart at all times relevant to Petitioner's appeal, in the *Steve Moore* case. Mr. Griffin filed an Answer on behalf of Wal-Mart and its co-defendant. (Appx. 8f). Mr. Griffin represented himself to the Circuit Court of Crawford

County, Arkansas as the attorney for Wal-Mart in relationship to production of discovery documents by a Confidentiality Agreement. (Appx. 14f). Mr. Griffin made settlement proposals to opposing counsel wherein he writes, "Wal-Mart and Stoeger-Llama have instructed me to make a final offer of $35,000.00 total to settle this case." (Appx. 17f). The Friday, Eldredge & Clark Law Firm have represented themselves to the public, opposing counsel, a state court judge, and federal district judge as attorneys for Wal-Mart in the above referenced product liability actions.

Upon learning of the disqualifying interest of Special Associate Justice Fleischaier, Petitioner filed her Petition for Vacatur in the Arkansas Supreme Court. Paragraph 11 of the Petition for Vacatur states:

> That the failure of this Court to vacate its opinion, involving a disqualified Special Justice, would violate Petitioner/Appellee's due process rights to access to a fair and impartial judicial tribunal, pursuant to the 14th Amendment to the United States Constitution. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

(Appx. 10e). The response of Wal-Mart did not address the federal Constitutional issues raised by Petitioner. The Arkansas Supreme Court summarily denied the Petition for Vacatur by Per Curiam Order entered on November 2, 2000, issuing no opinion. (Appx. 1a). The three Justices who initially disqualified themselves from participating during the appellate process also disqualified themselves from participation on the Petition for Vacatur. The Arkansas Supreme Court Clerk has advised that Special

Associate Justice Fleischaier participated in the decision to deny the Petition for Vacatur.

ARGUMENT

The Arkansas Supreme Court has violated Petitioner's rights to due process pursuant to the Fourteenth Amendment of the United States Constitution, by allowing a member of the Court with a disqualifying interest to participate and cast the deciding vote, in the reversal of her Judgment on appeal. This Court's mandate regarding the requirement of an impartial decisionmaker, as laid out in *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813 (1986), was ignored. Because these issues are so intertwined, they must be addressed simultaneously.

Even though this important federal question was timely presented to the Arkansas Supreme Court, by Petition for Vacatur, the Arkansas Supreme Court dodged its responsibility by summarily denying the Petition for Vacatur without comment. This Court has affirmatively stated that state courts are charged with the responsibility of enforcing federal rights. *See Howlett v. Rose*, 496 U.S. 356 (1990). Refusal by a state court to decide a properly presented federal question which is necessary to the state court's disposition of the case before it, is similar in effect to a state court's silence on a federal question. Neither operates to defeat this Court's jurisdiction. *See NAACP v. Alabama*, 377 U.S. 288 (1964).

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But

> our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955). Because Friday, Eldredge & Clark Law Firm represented Wal-Mart through its litigation department, at the same time Petitioner's case was pending on appeal before the Arkansas Supreme Court, Special Associate Justice Fleischaier was disqualified from participating in the decision of this matter on appeal, pursuant to the MODEL RULES OF PROFESSIONAL CONDUCT and the ARKANSAS CODE OF JUDICIAL CONDUCT. Special Associate Justice Fleischaier not only had a duty to disclose the conflict of interest, but also to disqualify herself from participating in the appeal of this case, pursuant to the MODEL RULES OF PROFESSIONAL CONDUCT and the ARKANSAS CODE OF JUDICIAL CONDUCT.

The actions of Special Associate Justice Fleischaier in serving as a judicial officer in this cause of action was clearly marked by a conflict of interest, created an appearance of impropriety, impugned the integrity of the Arkansas Supreme Court and ran afoul of the requirement that judges recuse from cases in which their impartiality might reasonably be questioned under the ARKANSAS CODE OF JUDICIAL CONDUCT Canon 3E(1). Article VII, Section 20 of the ARKANSAS CONSTITUTION and Canon 3E(1)(c) of the ARKANSAS CODE OF JUDICIAL CONDUCT provide that judges must refrain from presiding over cases in which they might be interested and avoid all appearances of bias. The rules regarding the actions of a judicial officer are applied to Special Justices, with the same vigor as regularly elected Justices. *See Medlock v. Leathers*, 311

Ark. 175, 182, 842 S.W.2d 428, 432 (1992). The federal standard of 28 U.S.C. § 455 and Canon 2 of the ARKANSAS CODE OF JUDICIAL CONDUCT are virtually the same. *See generally Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Byler v. State*, 210 Ark. 790, 197 S.W.2d 748 (1946).

The disqualifying conflict of Special Associate Justice Fleischaier is real, significant, and material. Special Associate Justice Fleischaier voted with three other Justices to constitute the majority decision in the case. Two Justices dissented and would have affirmed the Judgment of the Trial Court. The vote cast with the majority by Special Associate Justice Fleischaier was a crucial swing vote, which was determinative of the outcome of the case. Had Special Associate Justice Fleischaier voted with the dissent, the decision would have been a three to three tie. Under such circumstances, the Judgment of the Trial Court is affirmed. *See* ARK. CODE ANN. § 16-11-104 (Repl. 1999); *Barnard & Leas Mfg. Co. v. Smith*, 77 Ark. 590, 92 S.W. 858 (1906).

Petitioner used due diligence to file a Petition for Vacatur, with the Arkansas Supreme Court, upon learning of the disqualifying conflict of interest of Special Associate Justice Fleischaier. In instances where the disqualifying information regarding a judge is learned after the time for an appeal or petition for rehearing, a petition for vacatur is the appropriate method to call said error to the attention of the court. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Petitioner argued that Special Associate Justice Fleischaier's participation in the case violated her rights

under the due process clause of the Fourteenth Amendment to the United States Constitution. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); and *In re Murchison*, 349 U.S. 133 (1955). On November 2, 2000, the Arkansas Supreme Court summarily denied Petitioner's Petition for Vacatur and Supplement to Petition for Vacatur, without opinion. The three Arkansas Supreme Court Justices who originally disqualified themselves from participation in the case did not participate in the decision to deny the Petition for Vacatur. The two Special Associate Justices who participated in the original decision on appeal, also participated in the decision to deny the Petition for Vacatur. Special Associate Justice Fleischaier not only sat in judgment of Petitioner when she had a clear disqualifying interest, she also participated in the decision of the Arkansas Supreme Court to ignore that disqualifying interest.

This Court has held that no judge can be a judge in his own case or be permitted to try cases where he has an interest in the outcome, under the Due Process Clause. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). In *Aetna v. Lavoie*, a justice of the Alabama Supreme Court was held to have a disqualifying interest because he participated in the decision on appeal, while his own personal case was pending, which could possibly be bolstered by the decision adverse to *Aetna*. As noted by this Court, it is not necessary to determine whether Special Associate Justice Fleischaier was in fact biased against Petitioner. The appropriate question is whether her sitting on the case then before the Arkansas Supreme Court would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true

between the parties. "The Due Process Clause may sometimes bar a trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." 475 U.S. at 825.

Just as in *Aetna Life Ins. Co. v. Lavoie, supra,* the majority of the Arkansas Supreme Court ostensibly changed substantive law:

> In disregarding our oft-stated standard of review, the majority discards decades of jurisprudence followed by appellate courts in Arkansas and virtually every other state in this country. The net result is that our jury system is undermined by what amounts to a weighing of evidence and a retrial of the case at the appellate level.

Wal-Mart Stores, Inc. v. Binns, 341 Ark. 157, 165-166, 15 S.W.3d 320 (2000). (Brown, J., dissenting). Just as in *Aetna Life Ins. Co. v. Lavoie, supra,* here the Special Associate Justice being challenged cast the deciding vote determinative in the outcome of the case. However, as Justice Blackmon stated in his concurrence, the Due Process Clause requires an impartial decisionmaker. He stressed that the Constitutional violation should not depend upon the fact that the deciding vote was cast by the disqualified judge. "For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking – whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion – posed an unacceptable danger of subtly distorting the decisionmaking process." 475 U.S. at 830. Just as in *Aetna Life Ins. Co. v.*

Lavoie, supra, the Arkansas Supreme Court ignored its own direct precedent relating to vacating appellate decisions when a disqualifying interest of an appellate justice was learned after a decision was rendered. *See Parham v. Church Mutual Ins. Co.*, 53 Ark. App. 194, 922 S.W.2d 724 (1996) (appellate justice's wife represented by law firm filing appeal); *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 663B, 758 S.W.2d 415 (1988) (appellate justice had claim pending against non-party insurer of appellant).

Even though presented with clear precedent from the Supreme Court, the Arkansas Supreme Court chose to ignore Petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution, and decided an important federal question in a way that conflicts with the relevant decisions of the Supreme Court. The Arkansas Supreme Court's failure to enforce Petitioner's right to a fair trial, by allowing a disqualified justice to sit in judgment of her case, violated basic principals of due process. Such actions impinge the expectations of due process, of all litigants seeking justice in the Arkansas Court system. The Fourteenth Amendment to the United States Constitution, ensures that Petitioner, and other citizens of Arkansas, will not have their due process rights extinguished in such summary fashion.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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arrest and Craig and Langley were incompetent and negligent in referring her to authorities. She also suggested that Wal-Mart's motivation was that "[t]hey didn't know the computer system. . . . They didn't know how to run it." In fact, she described their conduct as a "mistake" because they did not ask her any questions about how the computer ran and mistakenly concluded that she took money. Notably, Binns also admitted that she had no indication that either Craig or Langley were motivated by revenge, ill-will, spite, or hatred.

Binns also averred that Wal-Mart used the criminal prosecution in an effort to extort money from her. However, her own recollection belies that claim. She testified that Langley told her, "No matter what you say we're going to prosecute; you're going to pay this money back." In light of this statement, Binns argues that the evidence was sufficient for the jury to infer malice, a required element for the tort of malicious prosecution. The circuit court agreed and denied appellant's directed-verdict motions. From the verdict and damages awarded in favor of appellee, comes the instant appeal.

I. Abuse of process

Wal-Mart's first point on appeal challenges the circuit court's denial of its directed-verdict motion on Binns's abuse-of-process claim. In reviewing the trial court's denial of appellant's directed-verdict motion, we must view all reasonable inferences in the light most favorable to Binns and affirm the jury's verdict if there is substantial evidence to support it. Substantial evidence is that which is of sufficient force and character that it will

compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Garrett v. Brown*, 319 Ark. 662, 665, 893 S.W.2d 784, 786 (1995). Here, we conclude that the jury lacked sufficient evidence to support the verdict, and we reverse.

In order to prove the tort of abuse of process, a plaintiff must establish the following elements: (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success, but (2) perverted to accomplish an ulterior purpose for which it was not designed, and (3) a willful act in the use of process not proper in the regular conduct of the proceeding. *Union Nat. Bank of Little Rock v. Kutait*, 312 Ark. 14, 16, 846 S.W.2d 652, 654 (1993). The key to an abuse-of-process claim is improper use of process *after* issuance, even when issuance has been properly obtained. *Id.* As distinguished from malicious prosecution, abuse of process "is somewhat in the nature of extortion or coercion." *Id.*

In the instant case, Binns failed to introduce sufficient evidence to support her abuse-of-process claim. First, she produced no evidence that Wal-Mart committed an abusive or coercive act *after* the arrest warrant was issued. Second, she introduced no evidence that the process was initiated to accomplish an ulterior purpose for which it was not designed. In fact, Binns's own testimony failed to support her theory that Wal-Mart threatened criminal prosecution in an effort to extort money from her. According to Binns's, Langley told her, "No matter what you say we're going to prosecute; you're going to pay this money back." The tenor of Langley's alleged statement is that Binns would not escape prosecution regardless of her promise to pay. Likewise, appellee's

suggestion that Langley attempted to have her criminal charges reinstated after they were *nolle prossed* is not sufficiently borne out by the record. Langley testified only that he may have made one phone call to the prosecutor after he learned that the criminal charges were *nolle prossed*.

In sum, we cannot say that substantial evidence supported the jury's findings that Wal-Mart's actions were undertaken to accomplish an ulterior purpose for which the process was not designed. Nor can we find substantial evidence in the record that Wal-Mart acted wilfully in the use of process after issuance. Viewing all reasonable inferences in the light most favorable to appellee, we reverse the circuit court's denial of appellant's directed-verdict motion, and we reverse the jury's verdict.

II. Malicious prosecution

Wal-Mart's second point on appeal assigns as error the circuit court's denial of its directed-verdict motion with respect to Binns's malicious-prosecution claim. Again, when we review the trial court's denial of appellant's directed-verdict motion, we must view all reasonable inferences in the light most favorable to Binns and affirm the jury's verdict if there is substantial evidence to support it. *Garrett*, 319 Ark. at 665, 893 S.W.2d at 786. We have held that the essential elements of the tort of malicious prosecution are (1) lack of probable cause, and (2) malice. *Cordes v. Outdoor Living Center, Inc.*, 301 Ark. 26, 31, 781 S.W.2d 31, 33 (1989). Significantly, the two elements are not interchangeable, although malice may be inferred from lack of probable cause. *Id.* Probable cause

for prosecution must be based upon the "existence of facts or credible information that would induce the person of ordinary caution to believe the accused person to be guilty of the crime for which he is charged." *Id.*

Generally, ordinary caution is a standard of reasonableness and an issue for the jury. *Id.* However, when the facts relied upon to establish probable cause are undisputed, the question of whether probable cause exists is one for the courts. *Keebey v. Stifft*, 145 Ark. 8, 21, 224 S.W. 396, 400 (1920). If Wal-Mart, as the defendant in this malicious-prosecution case, "believed and had grounds for entertaining 'honest and strong suspicion' that [Binns] was guilty" of a crime, it was entitled to a directed verdict. *See id.* Here, Wal-Mart claims that its employees, Craig and Langley, believed and had grounds for an honest and strong suspicion that Binns was taking money from the cash registers because (1) she canceled customers' final lay-away payments shortly after they left the store with merchandise, and (2) cash reports revealed no corresponding cash overage. Notably, Binns introduced no evidence to contradict Wal-Mart's argument that Craig and Langley *believed* that the cash report should have shown an overage under these circumstances. In fact, she suggested that they made a "mistake." Viewed in the light most favorable to Binns, we cannot say that the jury had substantial evidence to find that Wal-Mart lacked probable cause.

To maintain a malicious-prosecution action, Binns must also prove the existence of malice. *See Kable v. Carey*, 135 Ark. 137, 142, 204 S.W. 748, 750 (1918). In support of the malice element, Binns relies upon the expert testimony of Kevin Parker, who reported that the Wal-Mart

computer system would not have shown an overage when she canceled the last payment, even if she did not remove from the drawer the amount of the canceled payment. However, Parker also testified that, in his opinion, Craig and Langley believed that they had probable cause to conclude that Binns was taking money from the register. Moreover, based upon his evidentiary review and personal knowledge, Parker admitted that he did not believe that Craig and Langley's actions in initiating the criminal proceedings arose from ill will, spite, or a spirit of revenge. Similarly, Binns's own testimony confirms her belief that Wal-Mart management acted out of incompetence.

In the absence of any evidence of malice, the malicious-prosecution claim dissolves. Moreover, we expressly reject Binns's argument that malice may be presumed from appellant's negligence. Viewing all reasonable inferences in the light most favorable to Binns, we hold that the jury lacked substantial evidence to satisfy the elements of malicious prosecution. Accordingly, we conclude that the trial court erred by failing to direct a verdict in Wal-Mart's favor, and we reverse the jury's verdict.

III. Punitive damages

Wal-Mart's final point on appeal is that the circuit court erred by permitting punitive damages to be awarded based upon a lesser degree of *scienter* than was required for the underlying tort. The jury returned a general verdict for damages, awarding Binns $750,000.00 in compensatory damages and $2,000,000.00 in punitive

damages, attributable to both the abuse-of-process and malicious-prosecution claims. Based upon AMI 2217, the circuit court instructed the jury that "in order to recover punitive damages from [Wal-Mart], Carolyn Binns has the burden of proving that the defendant *intentionally pursued* a course of conduct for the purpose of causing damage." (Emphasis added.) In selecting AMI 2217, the court declined Wal-Mart's proffered instruction requiring Binns to prove that Wal-Mart "intentionally and maliciously pursued a course of conduct for the purposes of causing damages to Carolyn Binns, carried out with the state of mind characterized by hatred, ill will, or a spirit of revenge."

Appellant notes that the use of AMI 2217 under the instant facts creates an inconsistent standard for awarding punitive damages when the underlying tort involves malice. We agree. For example, the underlying claim of malicious prosecution (which could have formed the sole basis for the challenged punitive-damages award), requires that the plaintiff prove intent and a spirit of ill will, hatred, or revenge. However, the jury instruction submitted inconsistently permits an award based on a lesser degree of *scienter*, merely proof that the defendant *intentionally* pursued a course of conduct for the purpose of causing damage. In light of the nature of appellee's claim, we conclude that the circuit court erred by submitting AMI 2217 to the jury because the instruction is inadequate for a tort requiring proof of malice. We reverse the circuit court's judgment and award of punitive damages.

Special Associate Justices W.H. "Sonny" Dillahunty and Jonann Coniglio Fleischaier, join.

GLAZE and BROWN, JJ., dissent.

CORBIN, IMBER, and SMITH, JJ., not participating.

ROBERT L. BROWN, Justice, dissenting. The majority opinion finds no substantial evidence to support a jury verdict in favor of the appellee, Carolyn Binns. It is no wonder. The majority opinion examines only the evidence favorable to Wal-Mart in its analysis. This is exactly the opposite of what the law requires.

To decide whether a jury's verdict is supported by substantial evidence, we have adopted the following ground rules. It is not within this court's province to try issues of fact; rather it is our task to review the record for substantial evidence to support the jury's verdict. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party receiving the judgment. *D.B. Griffin Warehouse, Inc. v. Sanders*, 336 Ark. 469, 986 S.W.2d 836 (1999). If there is any substantial evidence to support the verdict, we affirm the trial court. *Grendell v. Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987). We have further held that the weight and value of testimony is a matter within the exclusive province of the jury. *Routh Wrecker Serv. Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998); *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Thus, what the majority should have done but fails to do in the instant case is view the evidence in the light most favorable to Binns and to give that evidence its strongest probative force.

Strangely, the majority does not even mention the evidence favorable to Binns, much less give it its strongest probative force. In disregarding our oft-stated standard of review, the majority discards decades of jurisprudence followed by appellate courts in Arkansas and virtually every other state in this country. The net result is that our jury system is undermined by what amounts to a weighing of evidence and a retrial of the case at the appellate level.

a. Abuse of Process

The critical test for determining if the tort of abuse of process has been committed is whether there has been an improper use of process after its issuance to accomplish a purpose for which the process was not designed. *Routh Wrecker Serv., Inc. v. Washington, supra.*

The crux of Binns's case was the expert testimony of a former Wal-Mart manager, Kevin Parker. Parker's status as an expert is not contested by Wal-Mart in this appeal. He testified that Wal-Mart employees, Tim Langley and David Craig, only furnished the prosecutor with one piece of the evidentiary puzzle and that was the detail tapes from the cash registers. According to Parker, what they should have examined and turned over to the prosecutor were the daily cash reports to show whether the cash in the register drawer at the end of each day was long (too much) or short (too little). He further testified that store management is required to review the cash reports every day to ascertain whether the cash is short or long. If Binns had actually taken money, it would have shown up on the cash report, according to Parker. Finally,

he made the point that once the lay-away account is closed after final payment, canceling the final payment of an inactive account has no effect on the money received. The only way to determine if money is missing is to examine the cash reports.

In sum, Parker concluded that had Craig and Langley looked at the cash reports, they would have known no money was missing from the cash registers. The warrant for Binns's arrest issued at Wal-Mart's request on April 12, 1994. She was charged with a felony and a misdemeanor on May 25, 1994. It was not until June 5, 1995, more than year later, that the prosecutor dropped the charges. The prosecutor stated that he was doing so because there was insufficient proof based on Wal-Mart's own records. Surely more than a year was sufficient time for Wal-Mart to examine the cash reports to determine whether cash was actually missing. This, according to Parker, Wal-Mart failed to do. More importantly, this failure by Wal-Mart allowed the prosecution against Binns to continue for over a year without providing the prosecutor *with proof that cash was actually missing*. According to Parker, the detail tapes proved nothing.

This court has held that allowing a prosecution to continue without providing all of the facts can constitute abuse of process. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998); *Harmon v. Carco Carriage Corp.*, 320 Ark. 322, 895 S.W.2d 938 (1995). That is exactly what occurred in this case.

I am, of course, aware of the fact that Langley and Craig testified that they had the cash reports and concluded that money had been stolen. But Parker, Binns's

expert, contradicted this testimony and testified that Langley could not have seen the cash reports. This was a credibility issue for the jury to resolve, and not this court. *Union Pac. R.R. Co. v. Sharp, supra.* Our function is to decide whether Parker's testimony constitutes substantial evidence of abuse of process. And this court has made it perfectly clear in the past that the testimony of an expert witness in support of a claim equates to substantial evidence unless it is shown that the opinion is without reasonable basis. *Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co.*, 324 Ark. 266, 920 S.W.2d 829 (1996); *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993); *Wallace v. Williams*, 263 Ark. 702, 567 S.W.2d 111 (1978).

There is no doubt that substantial evidence supporting the jury verdict existed on this count.

b. Malicious Prosecution

Wal-Mart mounts an offensive on the malicious-prosecution verdict on two bases: (1) Craig and Langley truly believed that Binns had stolen money, and (2) neither Binns nor Kevin Parker testified that the two Wal-Mart employees were malicious people. The first basis, of course, is self-serving, and the second is irrelevant since the determination of malice falls within the province of the jury. Furthermore, we have made it clear that malice can be inferred from a conscious indifference to the resulting consequences. *See Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). Again, the majority falls into the trap of recounting evidence supporting Wal-Mart's theory of the case rather than examining and analyzing the evidentiary basis for Binns's claim.

On the element of probable cause, Kevin Parker testified that had Langley and Craig looked at the cash reports, they would have known that probable cause was nonexistent. In addition, he recounted for the jury's benefit that Wal-Mart had violated its own internal policies by not confirming employee theft by eyewitness testimony, a confession, or tapes from a video camera. It merely relied on the detail tapes which Parker made clear do not confirm an actual shortage of cash.

Malice may be inferred from a lack of probable cause. *Corders v. Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). There was, too, Langley's statement to Binns on March 28, 1994: "No matter what you say we're going to prosecute; you're going to pay this money back." Again, in complete disregard of our standard of review, the majority interprets this statement in a light favorable to Wal-Mart. The jury, however, could have readily interpreted Langley's comment as a threat to prosecute to get Binns to pay the money he suspected she had stolen. That, of course, would be evidence of malice. And if Wal-Mart failed to supply the critical cash reports to the prosecution in timely fashion, which Kevin Parker maintains were completely exculpatory, the jury could have accepted this as further evidence of malice. Finally, there was a telephone call by Langley to the prosecutor after the charges were dropped. Langley testified that he was not sure he tried to "meet" with the prosecutor to have the charges reestablished, but he did make a telephone call after the charges were dropped. Again, the jury could have taken that as an indication of malice.

In short, Wal-Mart pursued criminal charges against Binns for more than a year when, according to Kevin

Parker, the cash reports exonerated her and when Wal-Mart had failed to follow its own procedures to establish employee theft. The prosecutor ultimately dropped charges due to insufficient evidence *based on Wal-Mart's records*. A combination of the above easily qualifies as substantial evidence of malicious prosecution.

c. Punitive Damages

As a final point, the majority criticizes the trial judge for instructing on punitive damages for intentionally pursuing a course of conduct for the purpose of causing damage when that is precisely what our Model Jury Instruction provides and what we have confirmed in at least one decision. *See* AMI 2218, formerly AMI 2217; *see also Croom v. Younts*, 323 Ark. 95, 913 S.W.2d 283 (1996).[1] For the majority to blithely disregard AMI instructions and the *Crooms* case with no explanation is unfair to Binns in the extreme.

Of course, the majority need not reach the punitive damages point at all, because the majority would affirm no compensatory damages for Binns. Our cases are legion to the effect that there must be an award of compensatory damages to support an award of punitive damages. *See, e.g., Limited Stores, Inc. v. Wilson-Robinson*, 317 Ark. 80, 876 S.W.2d 248 (1994); *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988).

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[1] The 1999 codification of *AMI, Civil*, lists former AMI 2217 on punitive damages as AMI 2218.

I conclude that the majority does a disservice to the parties in the case and to our common law when it fails to follow our standard of review, to discuss apposite case authority, or to examine evidence supporting the jury's verdict and the resulting judgment. I would affirm the jury verdict.

GLAZE, J., joins.

APPENDIX D

IN THE CIRCUIT COURT
OF DREW COUNTY, ARKANSAS

CAROLYN BINNS

PLAINTIFF

VS. NO. CIV 96-6-3

WAL-MART STORES, INC.

DEFENDANT

JUDGMENT

(Filed Dec. 18, 1998)

On this 11th day of December, 1998, this cause came on to be heard, plaintiff, Carolyn Binns, appearing in person and by her attorneys, John Ogles and Sara M. Sawyer, and the defendant, Wal-Mart Stores, Inc., appearing in person and by its attorneys, Steve Quattlebaum and Thomas G. Williams, and all parties being prepared for trial, a jury composed of twelve members of the regular panel of petit jurors of this court was selected, impaneled, and sworn according to law to try the issues of fact arising in this case. After hearing all of the evidence introduced, the instructions of the court and the arguments of counsel, the jury retired to consider its verdict, and after deliberating thereon returned the following verdict.

"We the jury find in favor of the plaintiff on her abuse of process claim against Wal-Mart Stores, Inc."

Marilyn Bostian
Foreperson

"We the jury find in favor of the plaintiff on her malicious prosecution claim against Wal-Mart Stores, Inc."

Marilyn Bostian
Foreperson

"If you find for the plaintiff on either her abuse of process or malicious prosecution claim, enter the total amount of compensatory damages here: compensatory damages $750,000."

Marilyn Bostian
Foreperson

"We the jury find the punitive damages should be imposed against Wal-Mart Stores, Inc. in the amount of $2 Million."

Marilyn Bostian
Foreperson

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that, Carolyn Binns, plaintiff, have and recover of and from Wal-Mart Stores, Inc., the sum of $2,750,000.00, with interest thereon from this date until paid at the rate of 10% per annum, together with all their costs herein expended, for all of which execution may issue.

IT IS SO ORDERED.

/s/ Joseph P. Mazzen, III
CIRCUIT JUDGE
12-17-98
DATE

PREPARED:

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APPENDIX E

IN THE ARKANSAS SUPREME COURT

WAL-MART STORES, INC. APPELLANT

VS. NO. CA 99-810

CAROLYN BINNS APPELLEE

APPEAL FROM THE
DREW COUNTY CIRCUIT COURT
HONORABLE JOSEPH P. MAZZANTI, III

APPELLEE'S PETITION FOR VACATUR

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IN THE ARKANSAS SUPREME COURT

WAL-MART STORES, INC. APPELLANT

VS. NO. 99-810

CAROLYN BINNS APPELLEE

PETITION FOR VACATUR

Comes now the Petitioner/Appellee, Carolyn Binns, by and through her attorneys, Gibson & Hashem, P.L.C., Sara Sawyer-Hartness, and John Ogles, and for her Petition states as follows:

1. That this matter involves a Petition for extraordinary relief, which is not within the scope of the Rules of the Arkansas Supreme Court or the Arkansas Rules of Appellate Procedure.

2. That this Petition is a matter of first impression in this jurisdiction, involving the disqualification of an appellate judge after the time for a Petition for Rehearing has elapsed.

3. That Petitioner/Appellee was awarded Judgment against Wal-Mart Stores, Inc. (hereinafter Wal-Mart) for $750,000.00 compensatory damages and $2,000,000.00 in punitive damages, based upon the causes of action of malicious prosecution and abuse of process. Wal-Mart appealed said Judgment and moved to transfer jurisdiction to the Supreme Court. This Court reassigned the case and accepted jurisdiction of the appeal.

4. Shortly after the transcript was docketed with this Court, on July 7, 1999, Justice Imber and Justice Corbin disqualified themselves from participating in the

decision on appeal. The Honorable W.H. "Sonny" Dillahunty and Jonann Coniglio Fleischaier were appointed as Special Associate Justices in their stead.

5. On the morning of Oral Arguments, Justice Smith disqualified himself, without warning, leaving only six justices to decide the case.

6. On April 27, 2000, the Supreme Court issued its Opinion, reversing the Judgment in favor of Petitioner/Appellee, and dismissed the action. Both Special Associate Justices joined with Chief Justice Arnold and Justice Thornton in the majority. A vigorous dissent was filed by Justices Brown and Glaze.

7. At the time the transcript was docketed with the Supreme Court (July 7, 1999), at the time of Oral Arguments (March 16, 2000), and at the time the Opinion was delivered (April 27, 2000), Special Associate Justice Fleischaier was disqualified from participating as a Supreme Court Justice on the appeal of this matter, pursuant to the Model Rules of Professional Conduct and the Arkansas Code of Judicial Conduct. Special Justice Fleischaier at all relevant times herein was, and continues to be, associated as a partner, practicing in the litigation section of the Friday, Eldredge & Clark Law Firm. Kevin A. Crass is also a partner, practicing in the litigation section of Friday, Eldredge & Clark Law Firm. At all relevant times herein, Mr. Crass did and continues to represent Wal-Mart Stores, Inc. in the case of *Ronald Hughes v. Wal-Mart Stores, Inc.*, case number LR-C-98-552, pending in the United States District Court for the Eastern District of Arkansas. Attached hereto as Exhibit "A" is the docket sheet showing the representation of Wal-

Mart Stores, Inc. by Mr. Crass in said product liability litigation. Attached hereto as Exhibit "B" is the Answer of Wal-Mart filed by Mr. Crass on October 6, 1998. Attached hereto as Exhibit "C" is the Motion for Summary Judgment of Wal-Mart, filed by Mr. Crass on August 17, 1999, just five weeks after the transcript in this case was docketed with the Supreme Court. Attached hereto as Exhibit "D" is the Joint Motion to Extend Discovery Cutoff filed by Mr. Crass on behalf of Wal-Mart on January 11, 2000, after Special Justice Fleischaier had been appointed to hear this case. Summary Judgment was entered in favor of Wal-Mart in the *Hughes v. Wal-Mart* case on February 22, 2000, Notice of Appeal was filed by Plaintiff Hughes on April 13, 2000, and the matter continues to this date on appeal before the United States Court of Appeals for the Eighth Circuit. Mr. Crass continues to represent Wal-Mart in said litigation.

8. That the representation of Wal-Mart by the law firm of Friday, Eldredge & Clark in a product liability action at the same time one of its litigation partners is acting as a Supreme Court Justice in determining an appeal involving a large jury award and substantial issues of public interest is clearly improper. Special Justice Fleischaier had a duty not only to disclose said conflict of interest, but to also disqualify herself from participating in the appeal of this case, pursuant to the Model Rules of Professional Conduct and the Arkansas Code of Judicial Conduct. The actions of Special Justice Fleischaier in serving as a judicial officer in this cause of action is clearly marked by a conflict of interest, creates an appearance of impropriety, impugns the integrity of this Court, and also runs afoul of the requirement that

judges recuse from cases in which their impartiality might reasonably be questioned under Arkansas Code of Judicial Conduct Canon 3E(1). *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). The proper administration of law requires not only that judges refrain from actual bias, but that they also avoid all appearances of unfairness, *Wakefield v. Wakefield*, 64 Ark. App. 147, 984 S.W.2d (1998). Judges must refrain from presiding over cases in which they might be interested and must avoid all appearance of bias. *Arkansas Department of Human Services v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998); *Skokos v. Skokos*, 332 Ark. 520, 968 S.W.2d 26 (1998). Article 7, Section 20 of the Arkansas Constitution and Canon 3(c) of the Arkansas Code of Judicial Conduct provide that judges must refrain from presiding over cases in which they might be interested and avoid all appearances of bias. *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997); *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997). Canon 1 of the Arkansas Code of Judicial Conduct requires judges to uphold the integrity and independence of the judiciary. Canon 2(a) requires a judge to avoid impropriety and the appearance of impropriety.

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety . . . the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

Commentary to Canon 2, Section A, *Arkansas Code of Judicial Conduct; Lofton v. State*, 57 Ark. App. 226, 234-235, 944 S.W.2d 131, ___ (1997) (Griffin, J. dissenting).

Canon 3(e) requires a judge to disqualify herself in a proceeding in which her impartiality might reasonably be questioned, *including where the judge has a personal bias or prejudice concerning a party. Dolphin v. Wilson*, supra. (emphasis added). Here, the actions of Justice Fleischaier in failing to disclose her conflict of interest and disqualify herself from these proceedings has violated each of the above referenced provisions of the Arkansas Code of Judicial Conduct. Furthermore, the Arkansas Constitution, Article 7, Section 20 requires that a judge disqualify herself in any matter in which she may be interested or in which she may have been of counsel. *Lofton v. State*, 57 Ark. App. 226, 944 S.W.2d 131 (1997). Clearly the representation of Wal-Mart by Mr. Crass is imputed to his law partner, Special Justice Fleischaier. The rules regarding the actions of a judicial officer apply to Special Justices, with the same vigor as regularly elected justices.

> When Justices of this court find it necessary to disqualify themselves from participating in a case it is imperative that there be some safety valve that will allow the parties to continue before the court; Special Justices serve this purpose. To argue that the Special Justices are not true Justices is absurd and only serves to create a myth that laws can be distinguished on varying levels of importance. For these reasons we conclude that any opinion of this court involving one or more Special Justices shall bear the same precedential value as any other.

Medlock v. Leathers, 311 Ark. 175, 182, 842 S.W.2d 428 ___ (1992).

9. The actions of Special Justice Fleischaier in sitting in judgment of Petitioner/Appellee at a time when she should have been disqualified was clearly prejudicial. Only six justices remained to determine the case after Justice Smith recused at the last minute, without warning. Justice Fleischaier voted with three other justices to constitute the majority. Two justices dissented and would have affirmed the Judgment of the Trial Court. The vote cast with the majority by Special Justice Fleischaier was a crucial swing vote, which was determinative of the outcome of the case. Had Justice Fleischaier voted with the dissent, the decision would have been a three to three tie. Under such circumstances, the Judgment of the Trial Court is affirmed. Ark. Code Ann. § 16-11-104; *Barnard & Leas Mfg. Co. v. Smith*, 77 Ark. 590, 925 S.W. 858 (1906). Wal-Mart cannot put forth credible argument that the crucial deciding vote of a disqualified judge in its favor was not prejudicial to Petitioner/Appellee. See, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986).

10. Counsel for Petitioner/Appellee only learned of the information regarding the disqualification of Special Justice Fleischaier, purely by accident, within the last three weeks, long after the Rules of the Arkansas Supreme Court allow for the filing of a Petition for Rehearing. Numerous hours of research have been necessary to properly present this issue to the Supreme Court. Counsel for Petitioner/Appellee has endured both the loss of his father and father-in-law during said period of time and has moved with all due diligence to bring this issue before the Court.

However, there was no waiver of the disqualification of Special Justice Fleischaier, because she failed to disclose the conflict of interest. Special Justice Fleischaier bore the duty of disclosure, in which she failed. "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Commentary to Canon 3E, *Arkansas Code of Judicial Conduct.* Ignorance for the grounds for disqualification cannot constitute a waiver, and if a party discovers the grounds after the trial has been completed, it is grounds for reversal on appeal. *Lofton v. State,* 57 Ark. App. 226, 944 S.W.2d 131 (1997). The precedent for such rule is found in *Byler v. State,* 210 Ark. 790, 197 S.W.2d 748 (1946):

> Notwithstanding the fact that the trial judge acted in the utmost good faith, we are unwilling to establish the precedent of permitting a disqualified judge to preside, who makes no disclosure of his disqualification. Of course, as had been said, the disqualification may be waived, but it is not waived by one who proceeds to trial in ignorance of the fact.
>
> It may be unfortunate that the case will have to be retried, but we think it better that a single case should be retried than to approve an improper precedent for the trial of future cases.

210 Ark. at 795. See also, *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194 (1988). In such instances where the disqualifying information regarding a judge is learned after the time for an appeal or petition for rehearing, a Petition for Vacatur is the appropriate method to call said error to the attention of the Court. In

Liljeberg, the U.S. Supreme Court held that it was appropriate to vacate the judgment of the District Court when it was learned, some ten months after an appeal was completed, that the trial judge had an appearance of impropriety because of his connection with one of the litigants. The standard is virtually the same as that used in Arkansas, in that any judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. § 455(a). The Supreme Court noted that scienter was not an element of a violation of § 455(a).

> The goal of § 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge or facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists, because the judge does not recall the facts, because the judge actually has no interest in the case, or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. (Citations omitted). Under § 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances would expect that the judge would have actual knowledge.

486 U.S. at 860-861. In *Lijeberg*, the Supreme Court approved the method of vacating the judgment and ordering a new trial in instances of judicial impropriety. This same procedure has been applied with regard to the disqualification of an appellate judge. *Aetna Life Ins. Co. v.*

Lavoie, 475 U.S. 813, 1065 S.Ct. 1580 (1986); *Ainsworth v. Combined Insurance Co.*, 105 Nev. 237, 774 P.2d 1003 (1989) (Nev. S. Ct. entertained motion to vacate appellate decision, based on allegation of impropriety, filed after appeal and time for rehearing). The Arkansas Appellate Courts have vacated appellate decisions on petition for rehearing when a disqualifying interest of an appellate justice was learned after the Opinion was rendered. See, *Parham v. Church Mutual Ins. Co.*, 53 Ark. App. 194, 922 S.W.2d 724 (1996) (appellate justice's wife represented by law firm filing appeal); *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 663-B, 758 S.W.2d 415 (1988) (appellate justice had claim pending against non-party insurer of appellant).

11. That the failure of this Court to vacate its opinion, involving a disqualified Special Justice, would violate Petitioner/Appellee's due process rights to access to a fair and impartial judicial tribunal, pursuant to the 14th Amendment to the United States Constitution. *Aetna Life Ins. Co. v. Lavoie*, 457 U.S. 813 (1986).

12. That Wal-Mart knew of the disqualifying interest of Special Justice Fleischaier. Wal-Mart clearly knew or should have known that the Friday, Eldredge & Clark Law Firm was representing Wal-Mart at the same time that Special Justice Fleischaier was acting in a judicial capacity in the appeal involving Petitioner/Appellee. Wal-Mart's failure to disclose this known conflict amounts to a constructive fraud on this Court. Because of the unclean hands of Wal-Mart, the Opinion delivered April 27, 2000 should be vacated and the Judgment of the Trial Court affirmed.

In the alternative, seven new Special Justices should be appointed pursuant to the precedent set forth in *Parham*, supra, and *Johnson Timber Corp.*, supra. The same factors influencing the court in *Johnson Timber Corp.*, supra, are present in this litigation:

> We have considered that the decision was not unanimous; we have considered the fact that there was a special justice participating; we have considered our duty to the appellees who are entirely innocent in this matter, who have won their lawsuit at the trial level and essentially prevailed on appeal; we have considered the nature of our decision. It was not a routine case and would unquestionably be an important precedent for future litigation. While we do not, in the opinion authored by Justice Purtle, overrule any of our prior decisions, a strong argument can be made that we did indeed depart from past decisions and head in a new direction.
>
> Finally, we have considered the reputation of this court and its meaning to those who come to us for final judgment regarding their rights, privileges and liberties. While we are not expected to be a perfect institution, we are expected to always try to do the right thing.

295 Ark. at 663-D. However, the seven new Special Justices should not be appointed by the Governor of the State of Arkansas pursuant to Arkansas Constitution, Amend. 77 § 1 (effective 1/1/99). The Honorable Mike Huckabee, Governor of the State of Arkansas, is a client of the law firm of Friday, Eldredge & Clark, specifically represented by Mr. Crass. See, Internet web page of Friday, Eldredge & Clark, Kevin A. Crass, Litigation Partner, attached hereto as Exhibit "E". Again the integrity of the

decisions of this Court would be called into question by the Governor, while a client of Special Justice Fleischaier's law firm, appointing the new Special Justices to rehear this matter.

13. That Petitioner/Appellee should be awarded a reasonable attorney's fee and costs for the bringing of this Petition.

14. I, Hani W. Hashem, certify that the Petition for Vacatur is not filed for the purpose of delay.

WHEREFORE, Petitioner/Appellee, Carolyn Binns, prays that the Opinion delivered on April 27, 2000 be vacated; that the Judgment of the Trial Court be affirmed; in the alternative, that seven new Special Justices be appointed to rehear this appeal, with said appointment coming from a source other than the Governor of the State of Arkansas; for her costs expended herein; for a reasonable attorney's fee; and for all other just and proper relief to which she is entitled.

Respectfully submitted,

CAROLYN BINNS,
Petitioner/Appellee

By: /s/ Hani Hashem
HANI W. HASHEM – 87076
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CERTIFICATE OF SERVICE

I, Hani W. Hashem, do hereby certify that a copy of the above and foregoing Petition for Vacatur was served in accordance with Rule 5 of the Arkansas Rules of Civil Procedure by mail, on this 10th day of October, 2000, on the following:

Mr. Leon Holmes and
Mr. Steven Quattlebaum
Williams & Anderson
111 Center Street,
22nd Floor
Little Rock, AR 72201

Mr. Morgan E. Welch
Arkansas Trial Lawyers
Association
225 East Markham,
Suite 200
Little Rock, AR 72201

/s/ Hani Hashem
HANI W. HASHEM

EXHIBIT A

Docket Sheet for 4:98-CV-552 U.S. District Court, Eastern District of Arkansas

TERMED APPEAL
DISC HLJ

U.S. District Court
USDC for the Eastern District of Arkansas
(Little Rock)

CIVIL DOCKET FOR CASE #: 98-CV-552

Filed: 08/14/98

Hughes, et al v. Wal-Mart Stores Inc
Assigned to: Judge Henry Woods
Demand: $0,000
Lead Docket: None
Dkt # in USCAB: is: 00-00-01720

Jury demand: Plaintiff
Nature of Suit: 365
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Product Liability

RONALD HUGHES, individually and as next friend and co-tutor of Bridgette Hughes, a minor child
plaintiff

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Charles Gary Southard
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Charles England Perry
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BETTY HUGHES, individually and as next friend and co-tutor of Bridgette Hughes, a minor child

Bridgette Hughes
plaintiff

Alfred F. "Tom" Thompson, III
(See above)
[COR LD NTC]

Charles Gary Southard
(See above)
[COR LD NTC]

James Allen Rasmussen
(See above)
[COR LD NTC]

Charles England Perry
(See above)
[COR LD NTC]

WAL-MART STORES INC
defendant

Kevin A. Crass
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(216) 515-1660

RONALD HUGHES, individually and as next friend and co-tutor of Bridgette Hughes, a minor child; BETTY HUGHES, other Bridgette Hughes, individually and as next friend and co-tutor of Bridgette Hughes, a minor child

U.S. District Court,
Eastern District of
Arkansas

plaintiff

v.

WAL-MART STORES
INC

defendant

Proceedings include all events

Date Filed	Doc. No.	Image	Description
08/14/1998	1	No	COMPLAINT with jury demand, $150.00 filing fee paid/receipt #80192, Summons issued and returned to counsel [Date Entered: 08/17/98, By: jp]

08/14/1998	2	No	MOTION by plaintiffs for admission pro hac vice of James Rasmussen, Gary Southard and Charles Perry and brief in support thereof [Date Entered: 08/17/98, By: jp]
10/06/1998	3	Yes: 4 Page(s); 122 KB; PDF	ANSWER by defendant [Date Entered: 10/07/98, By: bm]
10/09/1998	4	Yes: 3 Page(s); 73 KB; PDF	ORDER by Judge Henry Woods granting pltf's motion for admission pro hac vice of James Rasmussen, Gary Southard and Charles Perry [2-1]; records will reflect that these attys are now co-counsel for the pltf (EOD 10/9/98) (cc: all counsel) [Date Entered: 10/09/98, By: bm]
10/16/1998	5	Yes: 3 Page(s); 91 KB; PDF	MOTION by deft for pro hac vice appearance of attorneys Patrick F. Haggerty and Kip T. Bollin [Date Entered: 10/19/98, By: bm]

10/19/1998	6	Yes: 3 Page(s); 73 KB; PDF	ORDER by Judge Henry Woods granting motion for pro hac vice appearance of attorneys Patrick F. Haggerty and Kep T. Bollin as co-counsel for deft [5-1] (EOD 10/19/98) (cc: all counsel) [Date Entered: 10/19/98, By: bm]
08/11/1999	7	Yes: 3 Page(s); 86 KB; DF	SCHEDULING ORDER by Judge Henry Woods; jury trial set for 9:30 a.m. on 4/10/00 in Little Rock, AR; discovery due 2/10/00; pretrial info sheet due 3/10/00 (cc: all counsel) [Date Entered: 08/11/99, By: bm]
08/17/1999	8	Yes: 2 Page(s); 59 KB; DF	MOTION by defendant for summary judgment [Date Entered: 08/18/99, By: bm]
08/17/1999	9	Yes: 14 Page(s); 482 KB; DF	MEMORANDUM by defendant in support of motion for summary judgment [8-1] [Date Entered: 08/18/99, By: bm]

08/17/1999	10	Yes: 5 Page(s); 121 KB; DF	STATEMENT OF MATERIAL FACTS not in dispute by defendant [8-1] [Date Entered: 08/18/99, By: bm]
09/07/1999	11	Yes: 10 Page(s); 399 KB; DF	RESPONSE and brief in opposition by plaintiffs to motion for summary judgment [8-1] [Date Entered: 09/08/99, By: bm]
09/14/1999	12	Yes: 11 Page(s); 455 KB; DF	REPLY MEMORANDUM by defendant in support of motion for summary judgment [8-1] [Date Entered: 09/15/99, By: bm]
01/11/2000	13	Yes: 4 Page(s); 131 KB; DF	JOINT MOTION by parties to extend discovery-cut off date, and for continue trial date [Date Entered: 01/12/00, By: bm]
02/22/2000	14	Yes: 6 Page(s); 165 KB; DF	ORDER by Judge Henry Woods granting deft's motion for summary judgment [8-1]; terminating case (cc: all counsel) [Date Entered: 02/23/00, By: bm]

02/22/2000	15	Yes: 3 Page(s); 57 KB; DF	JUDGMENT: by Judge Henry Woods in accordance with the Order entered this date, judgment is entered on behalf of deft Wal-Mart, Inc (cc: all counsel) [Date Entered: 02/23/00, By: bm]
03/13/2000	16	Yes: 1 Page(s); 32 KB; DF	NOTICE of appeal by plaintiffs Ronald Hughes, Betty Hughes from District Court decision [14-2], [15-1] (appeal fees not paid) (2 certified to Clerk 8USCA), (cc: counsel) [Date Entered: 03/14/00, By: dc]
03/21/2000	–	No	DOCKETING LETTER: 8 USCA Number 00-1720; counsel to proceed on appendix [Date Entered: 03/21/00, By: dc]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RONALD HUGHES AND BETTY HUGHES,
individually and as next friends
and co-tutors of BRIDGETTE HUGHES,
a minor child PLAINTIFFS

vs. NO.LR-C-98-552

WAL-MART STORES, INC.

ANSWER OF DEFENDANT WAL-MART STORES, INC.

(Filed Oct. 6, 1999)

For its Answer, Defendant Wal-Mart Stores, Inc. ("Wal-Mart") states as follows:

1. Wal-Mart admits the allegations of Paragraph 1.

2. Wal-Mart denies the allegations of Paragraphs 2 and 3 for want of knowledge or information sufficient to form a belief as to their truth.

3. Responding to Paragraphs 4 and 5, Wal-Mart denies that Rubbermaid Specialty Products, Inc., or its affiliates designed, manufactured and marketed the fuel container in question for want of knowledge or information sufficient to form a belief as to that allegation. Further responding, Wal-Mart denies it sold such a container to Plaintiffs for want of knowledge or information sufficient to form a belief as to that allegation. Further responding, Wal-Mart denies the remaining allegations of Paragraphs 4 and 5.

4. Wal-Mart admits that it sells portable gasoline containers, but otherwise denies the allegations of Paragraph 6.

5. Wal-Mart denies the allegations of Paragraph 7 for want of knowledge or information sufficient to form a belief as to their truth.

6. Wal-Mart denies the allegations of Paragraphs 8, 8.1, 8.2, 8.3, 9, 9.1, 9.2, 9.3, 9.4, 10, 11, and 12.

7. Responding to Paragraph 12.1, Wal-Mart denies that the Hughes family, including Ronald Hughes, made use of the product for want of knowledge or information sufficient to form a belief as to the truth of that allegation. Wal-Mart denies the remaining allegations of Paragraph 12.1.

8. Wal-Mart denies the allegations of Paragraphs 12.2 and 12.3.

9. Wal-Mart denies the allegations of Paragraphs 13, 13.1, 13.2, 13.3, and 14 for want of knowledge or information sufficient to form a belief as to their truth.

10. Wal-Mart denies the allegations of Paragraph 15.

Affirmative Defenses

11. Plaintiffs' claims are barred, in whole or in part, because they fail to state a cause of action upon which relief can be granted.

12. Plaintiffs' claims are barred, in whole or in part, by the statute of limitations.

13. Plaintiffs' claims are barred, in whole or in part, due to their own contributory negligence.

14. The conduct of others over whom Wal-Mart had no control was the sole proximate cause or a proximate cause of the accident in question.

15. Plaintiffs' claims are preempted by federal law.

16. Plaintiffs' claims are barred, in whole or in part, by the doctrine of contribution and/or set-off.

17. The accident in question was caused by an unavoidable accident.

WHEREFORE, having fully answered, Defendants Wal-Mart Stores Inc. respectfully requests that Plaintiffs' claims be dismissed with prejudice; that the Court assesses costs against the Plaintiffs; and that Wal-Mart recover its reasonable legal fees and expenses incurred in defending these claims.

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
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(501) 376-2011

Attorneys for Wal-Mart Stores, Inc.

BY: Kevin A. Crass
KEVIN A. CRASS #84029

Of Counsel:

Patrick F. Haggerty, Esq.
Kip T. Bollin, Esq.
THOMPSON HINE & FLORY, LLP
3900 Key Center
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Cleveland, Ohio 44114-1216

CERTIFICATE OF SERVICE

I, Kevin A. Crass, do hereby certify that a copy of the foregoing was mailed to the following:

James A. Rasmussen
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Wichita Falls, Texas 76307-8185

Alfred E. "Tom" Thompson
Murphy, Post, Thompson & Arnold
1141 East Main St., #302
Batesville, Arkansas 72501-3016

on this 6th day of October, 1998.

/s/ Kevin A. Crass
KEVIN A. CRASS

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RONALD HUGHES and BETTY HUGHES
individually and as next friend
and co-tutors of BRIDGETTE HUGHES,
a minor child

vs. NO. LR-C-98-552

WAL-MART STORES, INC.

DEFENDANT WAL-MART STORES INC.'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 17, 1999)

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Wal-Mart Stores, Inc. ("Wal-Mart") moves this Court for summary judgment on the grounds that plaintiffs' claims are barred by the applicable product liability law of the State of Louisiana and, alternatively, plaintiffs Ronald and Betty Hughes' claims are barred by the applicable statutes of limitations. As such, there are no genuine issues of material fact and Wal-Mart is entitled to summary judgment in its favor.

A memorandum in support of this motion and a statement of undisputed material facts are attached to this motion.

Respectfully Submitted,

/s/ Kevin A. Crass
Patrick F. Haggerty, Esq. (0019703)
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-and-

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CERTIFICATE OF SERVICE

I, Kevin A. Crass, do hereby certify that a copy of the foregoing was mailed to the following:

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Alfred E. "Tom" Thompson
Murphy, Post, Thompson & Arnold
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Batesville, Arkansas 72501-3016

on this 17th day of August, 1999.

/s/ Kevin A. Crass
KEVIN A. CRASS

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RONALD HUGHES and **BETTY HUGHES** individually and as next friend and co-tutors of **BRIDGETTE HUGHES**, a minor child

PLAINTIFFS

vs. **NO. LR-C-98-552**

WAL-MART STORES, INC.

DEFENDANT

JOINT MOTION TO EXTEND DISCOVERY CUT-OFF DATE AND TO CONTINUE TRIAL DATE

(Filed Jan. 11, 2000)

Plaintiffs Ronald and Betty Hughes and Defendant Wal-Mart Stores, Inc. ("Wal-Mart") respectfully move this Court to extend the current February 10, 2000 discovery date by three months and to continue the current April 10, 2000 trial date by three months. Plaintiffs and Wal-Mart respectfully submit that the following reasons constitute good cause for the extensions requested:

1. Although there was some initial delay in discovery as discussed below, discovery is currently proceeding and counsel for plaintiffs and Wal-Mart have cooperated with each other with regard to the discovery which has taken place. Depositions of key fact witnesses took place in December, 1999 During the depositions of some of the fact witnesses, counsel learned of other fact witnesses who may have to be deposed. Accordingly, the parties

need additional time to schedule the depositions of those non-parties.

These discovery issues also affected the ability of the parties' respective experts to conduct and complete their evaluations and analyses and to form their opinions. The description of the accident by the various eyewitnesses will be crucial to the experts in forming their respective opinions. As of the filing of this motion, counsel for the parties have only just received copies of those depositions transcripts. Accordingly, an extension of time will permit the parties' experts to fully complete their evaluations so that full and proper presentation may be made at trial.

2. On August 17, 1999, Wal-Mart filed a motion for summary judgment, contending that Plaintiff's claims fail as a matter of law solely on the legal grounds, namely the statute of limitations and the applicability of Louisiana product liability law. Plaintiffs opposed this motion on September 3, 1999 and the matter has been fully briefed for decision since September 14, 1999.

Wal-Mart's motion and plaintiffs' brief in opposition did not and does not require conducting discovery. Accordingly, given the motion's dispositive nature, the parties were reluctant to undertake extensive discovery, including expensive expert discovery, to prepare this matter for trial given the possibility that Wal-Mart's motion might be granted, thereby nullifying the need for, and attendant expense of, such discovery. As a consequence, the parties delayed completing significant and

expensive discovery. An extension of the discovery deadline and the trial date will afford the parties the opportunity to make up for this delay.

3. Co-counsel for Wal-Mart, Kevin Crass of the law firm of Friday, Eldredge & Clark, has determined that he has a trial conflict with the current April 10, 2000 trial date. On April 3, 2000, Mr. Crass is scheduled to commence trial before the Honorable James Moody, of the United States District for the Eastern District of Arkansas, in the matter of *Henry Boerner, Administrator of the Estate of Mary Jane Boerner v. Brown & Williamson Tobacco Co.*, Case No. LR-C-98-427. The trial of this case is expected to last 4-6 weeks. Accordingly, Mr. Crass would be unavailable to serve as co-counsel for Wal-Mart in this trial. A continuance of the trial date would permit Wal-Mart to continue to be represented by counsel of its choice in this case.

The foregoing reasons demonstrate that good cause exists for this Court to extend the discovery deadline and to continue the trial date of this case. The parties respectfully submit that an extension of each of these dates by three months would provide a sufficient amount of time for the Court to rule on the pending motion for summary judgment and to permit the parties to complete the necessary factual and expert discovery. This motion is not being interposed solely for purposes of delay. Rather, it is being submitted to afford the parties a full and complete opportunity to prepare this matter completely for trial.

Accordingly, for the foregoing reasons, Plaintiffs Ronald and Betty Hughes and Defendant Wal-Mart Stores, Inc. request that this Court extend the

February 10, 2000 discovery deadline by three months and to continue the April 10, 2000 trial date by three months.

Respectfully submitted,

Patrick F. Haggerty, Esq (0019703)
Kip T. Bollin, Esq. (0065275)
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By: /s/ James A. Rasmussen by K [Illegible]
James A. Rasmussen, Esq.
Charles H. Perry, Esq.

CERTIFICATE OF SERVICE

A copy of the foregoing was served, by regular U.S. mail, this 11th day of January, 2000, upon the following:

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/s/ Kevin A. Crass
One of the Attorneys for the Defendant

EXHIBIT E

Welcome to the Friday, Eldredge & Clark Law Firm

KEVIN A. CRASS
Partner, Litigation

Practice Emphasis:

Business and Trade Litigation
Class Action Litigation
Environmental and Toxic Tort Litigation
Governmental and Regulatory Affairs

Education:

B.A. Ouachita Baptist University, 1981, With Honors
J.D. University of Arkansas at Little Rock, 1984

Professional Affilations:

Union Pacific Railroad Company, District Attorney
American, Arkansas and Pulaski County Bar Associations
National Association of Railroad Trial Counsel
Arkansas Association of Defense Counsel
Defense Research Institute
William R. Overton Inn of Court, Master of the Bench
Licensed in State and Federal Courts in Arkansas, United States Supreme Court, Eighth Circuit Co of Appeals, and United States Tax Court

Community Activities:

Second Presbyterian Church
Arkansans for Drug Free Youth, President and Board Member
Little Rock Boys Club, Board Member
Youth Sports Coach
United States Supreme Court Historical Society, Member

Representative Clients:

ALLTEL Corporation
Brown & Williamson Tobacco Company
Georgia – Pacific Company
WorldCom Inc.
Southwestern Energy Company
Governor Mike Huckabee, Arkansas

Contact:

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APPENDIX F

IN THE ARKANSAS SUPREME COURT

WAL-MART STORES, INC. APPELLANT

VS. NO. CA 99-810

CAROLYN BINNS APPELLEE

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT
HONORABLE JOSEPH P. MAZZANTI, III

APPELLEE'S SUPPLEMENT TO PETITION FOR VACATUR

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IN THE ARKANSAS SUPREME COURT

WAL-MART STORES, INC. APPELLANT

VS. NO. 99-810

CAROLYN BINNS APPELLEE

SUPPLEMENT TO PETITION FOR VACATUR

Comes now the Petitioner/Appellee, Carolyn Binns, by and through her attorneys, Gibson & Hashem, P.L.C., Sara Sawyer-Hartness, and John Ogles, and for her Supplement to Petition for Vacatur states as follows:

1. That Petitioner/Appellee filed her Petition for Vacatur in this Court on October 11, 2000. The basis of the Petition for Vacatur regards a conflict of interest by Special Justice Jonann Coniglio Fleischaier, which should have disqualified her from participating in the appeal of this matter. Specifically, Kevin A. Crass, a partner in the same law firm as Special Justice Fleischaier, was representing Appellant, Wal-Mart Stores, Inc. (hereinafter Wal-Mart) at the same time the appeal of this action was taking place.

2. Since filing the Petition for Vacatur, Petitioner/Appellee has discovered another case wherein the Friday, Eldredge & Clark law firm represented Wal-Mart in a product liability action during the same time period that this case was being reviewed on appeal. William M. Griffin, III is a partner in the Friday, Eldredge & Clark law firm, practicing in the litigation section. Special Justice Fleischaier is also a partner in the Friday, Eldredge & Clark law firm, practicing in the litigation section.

3. Since February 23, 1998, through the present, Mr. Griffin has represented Wal-Mart in the case of *Steve Moore v. Wal-Mart Stores Inc. & Llama-Gabilondo Y Cia S.A.*, pending in the Circuit Court of Crawford County, Arkansas, CIV-97-172. *See*, Answer to Complaint attached hereto as Exhibit "A"; Notice of Substitution of Counsel attached hereto as Exhibit "B"; Confidentiality Agreement attached hereto as Exhibit "C"; and, correspondence of Mr. Griffin to Mr. Dennis J. Davis, dated May 12, 2000 attached hereto as Exhibit "D".

4. That the representation of Wal-Mart by Mr. Griffin in the above referenced product liability action during the appellate review of Petitioner/Appellee's case, creates an additional conflict of interest, disqualifying Special Justice Fleischaier, for all of the same reasons as cited in the Petition for Vacatur.

5. That since the filing of the Petition for Vacatur, Friday, Eldredge & Clark has issued a press release, indicating that it did not represent Wal-Mart, but instead represented an underlying manufacturer, subject to an indemnity agreement, in the case of *Ronald V. Hughes v. Wal-Mart Stores, Inc.*, Michael Rowett, *Was conflict of interest, lawyer says*, ARKANSAS DEMOCRAT-GAZETTE, October 12, 2000, at 1B & 5B. The record is irrefutable that Friday, Eldredge & Clark represented Wal-Mart during the crucial period of time. Exhibit "D" to this Supplement is a settlement proposal from Mr. Griffin to Plaintiff's counsel, Dennis Davis, in the case of *Steve Moore v. Wal-Mart Stores, Inc.*, wherein Mr. Griffin writes "Wal-Mart and Stoeger-Llama have instructed me to make a final offer of $35,000.00 total to settle this case." Exhibit "D" to the Petition for Vacatur is a joint Motion filed in the *Ronald*

Hughes v. Wal-Mart Stores, Inc., case and at paragraph 3 states, "Co-counsel for Wal-Mart, Kevin Crass of the law firm of Friday, Eldredge & Clark, has determined that he has a trial conflict with the current April 10, 2000 trial date. . . . Accordingly, Mr. Crass would be unavailable to serve as co-counsel for Wal-Mart in this trial. A continuance of the trial date would permit Wal-Mart to continue to be represented by counsel of its choice in this case." The public record is abundantly clear that Friday, Eldredge & Clark represented Wal-Mart during the crucial time that Petitioner/Appellee's case was being decided on appeal. Model Rule of Professional Conduct 5.5(c) states that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgement in rendering such legal services. Model Rule of Professional Conduct 1.8 states that a lawyer shall not accept compensation for representing a client from one other than the client, unless the client consents after consultation, there is no interference with the lawyer's independence of professional judgement or with the lawyer-client relationship, and the confidentiality of the client is respected. Clearly, these provisions of the Model Rules of Professional Conduct indicate that a lawyer's duty of loyalty lies with the person he is retained to defend, irrespective of who may be paying the lawyer for his assistance.

The situation of Friday, Eldredge & Clark defending Wal-Mart under an indemnity agreement with an underlying manufacturer is no different that a liability insurance carrier retaining an attorney to defend an insured. In such instances, it is clear that the insured is the client, just

as Wal-Mart is and was the client of Friday, Eldredge & Clark. When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client. *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990). *See also, In Re the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (Under the Rules of Professional Conduct, the insured is the sole client of defense counsel); *Jackson v. Trapier*, 47 Misc. 2d 129, 247 N.Y.S. 2d 315 (1964) (Defendant is the client and not the insurance carrier, even though the insurer may have chosen the counsel and may be paying his fee); and, *Point Pleasant Canoe Rental Inc. v. Tinicum Township*, 110 F.R.D. 166 (E.D. Penn 1986) (when a liability insurer retains a lawyer to defend an insured, the insured is considered the lawyer's client).

6. The above referenced cases and the Model Rules of Professional Conduct clearly indicate that Wal-Mart was the client of Friday, Eldredge & Clark during the relevant time during the appeal of this matter. Clearly, the Friday Law Firm would have been unable to represent a party with interests adverse to Wal-Mart in litigation under the Model Rules of Professional Conduct. *For all the more reason*, this conflict of interest creates an appearance of impropriety under the Arkansas Code of Judicial Conduct which required both disclosure and disqualification of special Associate Justice Fleischaier.

WHEREFORE, Petitioner/Appellee, Carolyn Binns, prays that the Opinion delivered on April 27, 2000 be vacated; that the Judgment of the Trial Court be affirmed; in the alternative, that seven new Special Justices be appointed to rehear this appeal, with said appointment coming from a source other than the Governor of the

State of Arkansas; for her costs expended herein; for a reasonable attorney's fee; and for all other just and proper relief to which she is entitled.

Respectfully submitted,

CAROLYN BINNS,
Petitioner/Appellee

By: /s/ Hani W. Hashem
HANI W. HASHEM – 87076
GIBSON & HASHEM, P.L.C.
Post Office Drawer 447
Monticello, AR 71657
(870) 367-2438

SARA SAWYER-HARTNESS – 88158
Attorney at Law
204 West Union
Monticello, AR 71655
(870) 367-8304

JOHN OGLES – 89003
Ogles Law Firm
P. O. Box 891
Jacksonville, AR 72076
(501) 982-8339

CERTIFICATE OF SERVICE

I, Hani W. Hashem, do hereby certify that a copy of the above and foregoing Supplement to Petition for Vacatur was served in accordance with Rule 5 of the

Arkansas Rules of Civil Procedure by mail, on this 19th day of October, 2000, on the following:

Mr. Leon Holmes and
Mr. Steven Quattlebaum
Williams & Anderson
111 Center Street, 22nd Floor
Little Rock, AR 72201

Mr. Morgan E. Welch
Arkansas Trial Lawyers Association
225 East Markham, Suite 200
Little Rock, AR 72201

/s/ Hani W. Hashem
HANI W. HASHEM

EXHIBIT A

IN THE CIRCUIT COURT OF
CRAWFORD COUNTY, ARKANSAS

STEVE MOORE — PLAINTIFF

V. — CIV-97-172

WAL-MART STORES, INC. and
LLAMA-GABILONDO Y CIA, S.A. — DEFENDANTS

ANSWER TO COMPLAINT

The Defendants, Wal-Mart Stores, Inc. and Llama-Gabilondo Y Cia, S.A., for their Answer to the Complaint, do state:

1. The Defendants are without knowledge of Steve Moore's residency. The allegations regarding Wal-Mart are admitted. The allegations regarding Llama are admitted as to the fact that it is a foreign corporation doing business in the United States of America, however, whether it does business in Arkansas has not been determined and, therefore, that allegation is denied. It is admitted that the case involves a personal injury claim.

It is admitted that the Court has jurisdiction although removal to federal court may be appropriate.

Any other allegation contained in Paragraph 1 of the Complaint is denied.

2. Defendant is without knowledge of the allegations contained in Paragraph 2 of the Complaint and, therefore, those allegations are denied.

3. The allegations contained in Paragraph 3 of the Complaint are beyond the knowledge of these particular

Defendants and, therefore, those allegations are denied. The Defendants have made reasonable inquiry.

4. The allegations contained in Paragraph 4 of the Complaint, including subparts (a) through (f), are denied.

5. The allegations contained in Paragraph 5 of the Complaint, including subparts (a) through (d), are denied.

6. The allegations contained in Paragraph 6 of the Complaint are denied, except to the extent that Llama manufactures and supplies handguns. Any other allegation contained in paragraph 6 of the Complaint is denied.

7. The allegations contained in Paragraph 7 of the Complaint with respect to the fact that Wal-Mart supplies handguns is admitted. Any other allegation contained in Paragraph 7 of the Complaint is denied.

8. The allegations contained in the second Paragraph 6 of the Complaint are denied.

9. The allegations contained in the second Paragraph 7 of the Complaint are admitted if, in fact, the Plaintiff was the purchaser of the handgun.

10. The allegations contained in paragraph 8 of the Complaint are denied based on the fact that the Plaintiff has not complied with the Uniform Commercial Code.

11. The allegations contained in Paragraph 9 of the Complaint are admitted to the extent that attached to the Complaint are certain letters. Whether they comply with the requirements of the Uniform Commercial Code is specifically denied.

12. The allegations contained in Paragraph 10 of the Complaint, including subparts (a) through (f), are denied.

13. The Defendants concur in the Plaintiff's demand for a jury trial.

14. The allegations contained in the prayer for relief are denied.

15. That any allegation contained in the Complaint not specifically admitted herein is both generally and specifically denied.

16. That the Plaintiff's injuries or damages, if any, are the result of his own negligence or fault and the unsafe handling of this particular firearm.

17. That the Plaintiff assume the risk of his own injuries.

18. That the Plaintiff's injuries or damages, if any, are the result of negligence or fault of others for whom these Defendants are not responsible.

19. That these Defendants assert all defenses available to it under the Arkansas Products Liability Act as if set forth herein word for word.

20. That the Plaintiff's claim is barred by all applicable statutes of limitation as to certain claims.

21. That the Defendants reserve the right to amend their Answer upon completion of discovery.

WHEREFORE, having fully answered, Defendants pray that the Complaint be dismissed, for their costs, attorney's fees and all other proper relief.

William M. Griffin III
Friday, Eldredge & Clark
2000 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
501/376-2011

Attorneys for Defendants

By: /s/ William M. Griffin III
William M. Griffin III

CERTIFICATE OF SERVICE

I, William M. Griffin III, hereby certify that a copy of the above and foregoing has been served upon:

Mr. Dennis J. Davis
Boswell, Tucker & Brewster
P. O. Box 798
Bryant, AR 72089-0798

by placing said copy in the United States mail, postage prepaid, on this 23rd day of February, 1998.

/s/ William M. Griffin III
William M. Griffin III

EXHIBIT B

IN THE CIRCUIT COURT OF
CRAWFORD COUNTY, ARKANSAS

STEVE MOORE — PLAINTIFF

V. — CIV-97-172

WAL-MART STORES, INC. and
LLAMA-GABILONDO Y CIA, S.A. — DEFENDANTS

NOTICE OF SUBSTITUTION OF COUNSEL

Defendants Wal-Mart Stores, Inc. and Llama-Gabilondo Y Cia, S.A., for their Notice of Substitution of Counsel, do state:

1. William M. Griffin III, Friday, Eldredge & Clark, 2000 First Commercial Building, 400 West Capitol Avenue, Little Rock, Arkansas 72201-3493 is substituted as counsel for Ben Core, Daily & Woods, P.L.L.C., Suite 600, 623 Garrison Ave., P. O. Box 1446, Fort Smith, Arkansas 72902.

WHEREFORE, these Defendants respectfully request that all parties and the Court note this change in counsel.

Respectfully submitted.

Friday, Eldredge & Clark
2000 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
501/376-2011

By: /s/ William M. Griffin III
William M. Griffin III

Daily & Woods, P.L.L.C.
623 Garrison Ave., Ste. 600
P. O. Box 1446
Fort Smith, Arkansas 72902
501/782-0361

By: /s/ Ben Core
Ben Core

CERTIFICATE OF SERVICE

I, William M. Griffin III, hereby certify that a copy of the above and foregoing has been served upon:

Mr. Dennis J. Davis
Boswell, Tucker & Brewster
P. O. Box 798
Bryant, AR 72089-0798

by placing said copy in the United States mail, postage prepaid, on this 4th day of March, 1998.

/s/ William M. Griffin III
William M. Griffin III

EXHIBIT C

IN THE CIRCUIT COURT OF
CRAWFORD COUNTY, ARKANSAS

STEVE MOORE

V. CIV-97-172

WAL-MART STORES, INC. and
LLAMA-GABILONDO Y CIA, S.A.

CONFIDENTIALITY AGREEMENT

(Filed Jul. 21, 1999)

WHEREAS, defendants Wal-Mart Stores, Inc. and Llama-Gabilondo Y Cia, S.A. have, in connection with discovery obligations, agreed to produce certain documents.

WHEREAS, defendants would generally object to producing certain documents concerning the product which is the focus of this suit due to the proprietary and confidential nature, such as trade secrets and proprietary, private and non-public information.

NOW, THEREFORE, in order to permit discovery to proceed and in order to preserve the confidentiality of said documents;

IT IS HEREBY AGREED by the parties:

1. That defendants will make available drawings of the fire control group.

2. That defendants will make available in Little Rock, Arkansas, or make copies for the plaintiff to be sent to Bryant, Arkansas.

3. That, in consideration for the informal production of documents in this matter, the plaintiff, attorneys for the plaintiff and experts specifically retained or specifically employed for this litigation by the plaintiff agree to be bound by a confidentiality agreement.

4. That defendants, by agreeing to production of documents in this manner, do not waive any objections as to relevancy, materiality or relationship to this litigation. However, the defendants will produce the documents to expedite the discovery process.

5. That no copies of the documents will be made by the plaintiff except for purposes of this litigation.

6. That upon resolution of this litigation, all such documents and copies thereof will be returned to defendants by the plaintiff.

7. That to the extent that any documents are used by plaintiff's expert witnesses, each expert witness shall agree in writing that:

(a) They are bound by the terms of this Confidentiality Agreement;

(b) They will return all document to defendants upon conclusion of this litigation;

(c) They will not copy or reproduce any documents produced; and

(d) They will purge all of their files of the documents or information produced by defendants at the conclusion of this litigation.

DATED this 6th day of July, 1999.

DENNIS J. DAVIS, on his
behalf and on behalf of STEVE MOORE

/s/ Dennis J. Davis
Boswell, Tucker & Brewster
P. O. Box 798
Bryant, AR 72089-0798
Attorneys for Plaintiff

WILLIAM M. GRIFFIN III, on his
behalf and on behalf of WAL-MART STORES,
INC. and LLAMA-GABILONDO Y CIA, S.A.

/s/ William M. Griffin III
Friday, Eldredge & Clark
400 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201
Attorneys for Defendants

ORDER

Pursuant to the agreement of the parties, the foregoing stipulation is adopted as the Court's order for confidentiality.

DATED this 16 day of July , 1999.

/s/ Floyd G. Rogers
Honorable Floyd G. Rogers
Circuit Judge

EXHIBIT D

FRIDAY, ELDREDGE & CLARK

[Names and Addresses Omitted in Printing]

May 12, 2000

Mr. Dennis J. Davis
Boswell, Tucker & Brewster
P.O. Box 798
Bryant, AR 72089-0798

Re: *Steve Moore v. Wal-Mart Stores, Inc., et al.*
Crawford County Circuit Court No. CIV-97-172

Dear Dennis:

Wal-Mart and Stoeger/Llama have instructed me to make a final offer of $35,000 total to settle this case. It will also require return of the pistol for destruction. I have also been instructed to advise you that this is a final or "drop dead" offer.

I appreciate your courtesy in responding to this offer as soon as reasonably possible.

Thank you.

Sincerely,

/s/ William M. Griffin, III
William M. Griffin, III

WMG/dp
SP073-1

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC.

APPELLANT

v. No. 99-810

CAROLYN BINNS

APPELLEE

APPEAL FROM DREW COUNTY CIRCUIT COURT
HON. JOSEPH P. MAZZANTI, III PRESIDING

APPELLANT'S RESPONSE TO PETITION FOR VACATUR

Leon Holmes
Steven W. Quattlebaum
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1850
Little Rock, AR 72201
(501) 379-1700

Attorneys for Wal-Mart Stores, Inc.

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC.

APPELLANT

v. No. 99-810

CAROLYN BINNS

APPELLEE

APPELLANT'S RESPONSE TO PETITION FOR VACATUR

In *Seeco, Inc. v. Hales*, 341 Ark. 673, 701-2, 22 S.W.3d 157, 175 (2000), this Court stated:

> It is true that judges must refrain from presiding over cases in which they might be interested and must avoid all appearance of bias. *Arkansas Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998). But there is a presumption of impartiality, and the party seeking disqualification has the burden of proving otherwise. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). The decision to recuse is within the judge's discretion and will not be reversed absent an abuse of that discretion. *Id.* An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court. *Id.* A personal proprietary or pecuniary interest or one affecting the individual rights of the judge is an interest which will disqualify a judge; however, to be disqualifying, the prospective liability, gain, or relief to the judge must turn on the outcome of the suit. The question of bias is usually confined to the conscience of the judge.

See also Beshears v. State, 329 Ark. 469, 472, 947 S.W.2d 789, 791 (1997); *Dolphin v. Wilson*, 328 Ark. 1, 4, 942 S.W.2d 815, 817 (1997); *Lofton v. State*, 57 Ark. App. 226, 233, 944 S.W.2d 131, 134 (1997).

Appellee does not contend that Special Justice Fleischaier had a personal proprietary or pecuniary interest in the outcome of this case, or any prospective liability, gain, or relief turning on the outcome of the case. Thus, the issue before the court is not akin to the issue in *Johnson v. Sturdivant*, 295 Ark. 633B, 758 S.W.2d 415

(1988), where the justice who wrote the opinion for the court was the plaintiff in a lawsuit in which the issue was the same as the issue decided in that case; or in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), where Justice Embry of the Alabama Supreme Court participated in a decision involving an insurance company, when he had "a direct stake in the outcome of this case." 475 U.S. at 422, 106 S. Ct. at 1585. Nor is this case like *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), where the trial judge was a member of the board of trustees of a university that had an interest in the litigation, was monitoring the progress of the trial, reporting about the trial at board meetings, and sending reports to trustees, which the trial judge received, during trial. Nor is this case like *Bylar v. State*, 210 Ark. 790, 197 S.W.2d 748 (1996), where the trial judge presided over a murder trial with circumstances in which "his estate may be augmented by a successful suit for damages. . . . ," 210 Ark. at 794, 197 S.W.2d at 751. This case is more like *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998), where this Court stated:

> The Sturgises focus on the appearance of impropriety standard, to which we have referred, but they do not point to any bias or prejudice on the part of the Chancellor, and do not show that the Chancellor had any possibility of gain or loss dependent on the outcome of the suit. In these circumstances, we cannot say the Trial Court should have held that the Chancellor's decision would have been reversed on appeal because of an abuse of his discretion in deciding not to recuse.

335 Ark. at 55, 977 S.W.2d at 224.

Here, as in *Sturgis v. Skokos*, the claim is not that Special Justice Fleischaier had any interest in the outcome of the case; rather, the claim is that she should have disqualified pursuant to Canon 3(E)(1) because her impartiality might reasonably be questioned. The test is, "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned?. . . . Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). *See also State v. Ross*, 89 Haw. 371, 380, 974 P.2d 11, 20 (1999). The test is not how the situation would appear to the plaintiff, to the defendant, to counsel with a contingent fee interest, to the plaintiffs' bar, or to the defense bar; the test is whether "an objective, disinterested observer" who knows all of the facts would doubt that justice would be done absent recusal. "[I]t must be emphasized that the standard for recusal is an objective standard. The objective standard is essential when the question involves appearance." *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 109, 459 S.E.2d 374, 386 (1995).

The present claim of disqualification arises from a suit filed in the United States District Court for the Eastern District of Arkansas by Ronald Hughes in which Wal-Mart Stores, Inc., was the named defendant. The affidavits attached hereto describe the circumstances of Wal-Mart's involvement in that suit. In summary, the claim was a products liability claim involving a product manufactured by Rubbermaid. Rubbermaid and Wal-Mart had an agreement pursuant to which Rubbermaid would

defend any products liability claim against Wal-Mart and would pay any judgment entered in any such claim. When the Hughes case was filed, Wal-Mart tendered the defense to Rubbermaid, which accepted the tender. Rubbermaid's attorneys, located in Cleveland, Ohio, engaged Friday, Eldredge & Clark as their local counsel. Wal-Mart did not engage Friday, Eldredge & Clark, nor did Wal-Mart pay any of Friday, Eldredge & Clark's attorneys' fees. The Wal-Mart lawyer responsible for the present case, Allison Hatfield, was unaware that Rubbermaid had engaged Friday, Eldredge & Clark in the Hughes case.

Wal-Mart has searched its records in an effort to ascertain whether Friday, Eldredge & Clark has been involved in other Wal-Mart cases. The results of that search are stated in the affidavit of Dennis Kinney, attached hereto as Exhibit 5. Mr. Kinney found four products cases in which Friday, Eldredge & Clark was engaged by and paid by suppliers, and one employment case in which a Wal-Mart employee was represented by Friday, Eldredge & Clark at Wal-Mart's expense. As best Mr. Kinney could ascertain, Wal-Mart last paid fees to Friday, Eldredge & Clark in 1998, and those fees were paid in the employment case in which Friday, Eldredge & Clark represented an employee. So far as Mr. Kinney's search could find, the last engagement in which Wal-Mart paid Friday, Eldredge & Clark to represent Wal-Mart came to a conclusion in 1995.

Although, as Appellee notes in her Petition for Vacatur, this is a case of first impression, there are cases with analogous circumstances in which the Court might find guidance. For example, in *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Ct.*, 5 P.3d

1059 (Nev. 2000), the court held that the fact that a trial judge had received campaign contributions from some of the parties in a case before him did not raise a reasonable question at to the judge's impartiality. In *Albertson v. State*, 225 Ga. App. 389, 484 S.E.2d 18 (1997), the trial judge failed to recuse a criminal case in which her husband represented the victim. On appeal, the court held that recusal was not required, and stated:

> Under the peculiar circumstances of this case, the trial judge's impartiality cannot reasonably be questioned. Since the judge had no actual knowledge of her husband's representation of the victim during the trial, such representation could not have affected her partiality.

44 S.E.2d at 20.

In *Kelly v. State*, 238 Ga. App. 691, 520 S.E.2d 32 (1999), a criminal defendant contended that a judge should be disqualified because victims of the crime were county commissioners who paid the judge's salary. The court held to the contrary. firm. [sic]

In *McCullough v. McCullough*, 705 N.E.2d 190 (Ind. Ct. App. 1999), a party petitioned to disqualify a judge on the court of appeals after the decision has been rendered. The judge had been appointed to serve as senior judge of the court of appeals until the end of the year. The appeal was taken from the circuit on which he regularly sat and would have required overruling that circuit court. The petitioner contended that the regular judges of the circuit court were responsible for appointing him as senior judge and, therefore, he had a pecuniary interest in being appointed by those judges. The court of appeals held that

recusal was not necessary and that the impartiality of that particular judge could not reasonably be questioned.

These cases are in keeping with the provision of the code holding that a judge is not required to disqualify in a case in which he has a financial interest if that financial interest is *de minimis*. *See* Canon 3(E)(1)(c); *In Re: Disqualification of Lavrich*, 74 Ohio St. 3d 1216, 657 N.E.2d 1330 (1990); *Madsen v. Prudential Fed. Savings & Loan Ass'n*, 767 P.2d 538 (Utah 1988). Some interests are "too attenuated to require disqualification." *Allum v. Valley Bank of Nevada*, 112 Nev. 591, 594, 915 P.2d 895, 897 (1996).

Moreover, as the Supreme Court said in *Liljeberg v. Health Servs. Acquisition Corp.*:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance.

Liljeberg, 486 U.S. at 862, 108 S. Ct. at 2203. Similarly, the Supreme Court of West Virginia has held:

> We agree with the successor judge that a breach of our disqualification standards "calls into question the judicial process" and that the plaintiffs had an absolute right to disclosure; however, these rights even when violated do not automatically translate into a right to a new trial. Affirming the successor judge's ruling granting a new trial would create a per se rule that a new trial should be granted each time there is merely an appearance of impropriety without any additional supporting evidence indicating actual prejudice or bias. The reasoning of the successor judge flies directly into the

> teeth of the proposition that evidence of actual bias or prejudice must be presented and, in the bargain, contradicts the plain language of our harmless error rules and directly conflicts with our prior case law that new trials should be granted only in rare cases. Thus, a claim that there is a sense of unfairness about the trial is not enough to justify a new trial. . . . In other words, a claim of appearance of impropriety does not rise to the level of a fundamental defect in due process requiring a new trial.

Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 110-11, 459 S.E.2d 374, 387-88 (1995).

These considerations, pertinent as they are to the issue raised in a timely manner in an appeal following a trial, are all the more pertinent in the procedural context of the preset petition. As noted by the Appellee in her Petition for Vacatur, the Court issued its opinion on April 27, 2000. The time for filing a petition for rehearing has long since expired, and the mandate has long since issued. There is no evidence of actual bias by Special Justice Fleischaier, nor any evidence that she had any stake in the outcome of the case, nor any evidence of fraud by anyone involved in this case. Thus, the issue for the court is whether a decision of this court will be vacated, after the mandate has issued, based on a claim of an appearance of impropriety.

CONCLUSION

We are aware of the sensitive nature of the issue before the court. We are certain that there has been no dishonesty nor intentional misconduct by Special Justice

Fleishaier, nor by anyone at Wal-Mart. We submit the issue to the Court for its careful deliberation.

QUATTLEBAUM, GROOMS, TULL & BURROW PLLC
111 Center Street, Suite 1850
Little Rock, AR 72201
(501) 379-1700
By: /s/ Leon Holmes
Leon Holmes
Steven W. Quattlebaum

Attorneys for Wal-Mart Stores, Inc.

CERTIFICATE OF SERVICE

I certify that on this 20th day of October, 2000, a copy of the foregoing was mailed to the following:

Hani W. Hashem
Gibson & Hasem, P.L.C.
P.O. Drawer 447
Monticello, AR 71657

Sarah Sawyer Hartness
204 West Union
Monticello, AR 71655

John Ogles
P.O. Box 891
Jacksonville, AR 72076

Morgan E. Welch
Arkansas Trial Lawyers' Association
225 E. Markham, Suite 200
Little Rock, AR 72201

/s/ Leon Holmes
Leon Holmes

EXHIBIT 7

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC. **APPELLANT**

V. **No. 99-810**

CAROLYN BINNS **APPELLEE**

AFFIDAVIT OF ALLISON HATFIELD

Allison Hatfield, first being duly sworn, upon oath states of personal knowledge:

1. I am Allison Hatfield. I am employed as a lawyer in the legal department of Wal-Mart Stores, Inc. I have been so employed since February 1999.

2. The legal department of Wal-Mart Stores, Inc., includes seven lawyers who oversee tort claims against Wal-Mart and one lawyer who oversees products liability claims. Each of the lawyers who oversees tort claims against Wal-Mart will have responsibility for approximately 1,000 cases at any given time. The tort cases against Wal-Mart are assigned to lawyers in the legal department geographically.

3. The products liability claims are handled separately from the tort claims because Wal-Mart has an agreement with each of its suppliers that requires the suppliers to defend those claims and to be responsible for any judgments rendered in those claims. One lawyer in the legal department is responsible to ensure that proper demand is made upon the suppliers to defend and be responsible for any judgments in any products liability

claims. That lawyer will have several hundred claims at any given period of time.

4. Since I came to work at Wal-Mart, I have been responsible for all the tort claims against Wal-Mart filed in the state of Arkansas. During the time that I have been at Wal-Mart, I have never hired Friday, Eldredge & Clark to defend Wal-Mart. All of our claims in Central Arkansas, defended by Wal-Mart, have been assigned to Steve Quattlebaum.

5. I do not attend meetings or receive reports regarding the products liability cases. I was not aware that Friday, Eldredge & Clark had been retained as local counsel in *Ronald Hughes v. Wal-Mart Stores, Inc.*, until the motion for vacatur was filed in this matter last week.

Further Affiant sayeth not.

/s/ Allison Hatfield
Allison Hatfield

STATE OF ARKANSAS)
COUNTY OF ~~BENTON~~)
WASHINGTON)

SWORN TO AND SUBSCRIBED BEFORE me, a Notary Public, by Allison Hatfield on this 19 day of October, 2000.

/s/ Rhonda L. Balmer
Notary Public, State of Arkansas

My Commission Expires:

May 10, 2009

EXHIBIT 2

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC. **APPELLANT**

V. **No. 99-810**

CAROLYN BINNS **APPELLEE**

AFFIDAVIT OF DEBBYE SMITH

Debbye Smith, first being duly sworn, upon oath states of personal knowledge:

1. I am Debbye Smith. I am a lawyer employed by Wal-Mart Stores, Inc. From October 29, 1994, until April 1999, I was responsible for managing products liability litigation, including the claim made by Ronald Hughes. Since April 1999, I have worked in the Wal-Mart legal department on the business practice team.

2. Wal-Mart's Vendor Agreement contains an indemnification provision whereby the supplier defends claims arising from the product it sells to Wal-Mart and assumes responsibility for any judgments entered in those claims. When a products liability claim is made, Wal-Mart tenders the defense of the claim to the supplier of the product in question and demands that the supplier assume the defense and the responsibility for any judgment.

3. In the claim made by Ronald Hughes, the product at issue was manufactured by Rubbermaid. When suit was filed in Arkansas, summons and complaint were forwarded to Rubbermaid with a demand that Rubbermaid defend the suit and assume responsibility for any

judgment. Rubbermaid accepted its responsibility under the supplier agreement, and agreed to defend the suit and be responsible for any judgment.

4. Rubbermaid engaged the attorneys who defended that suit. Rubbermaid paid the attorneys who defended that suit. Wal-Mart did not engage anyone to defend that suit and did not pay any legal fees for the defense of that suit. Wal-Mart did not have any financial interest in that suit.

5. When I was handling products claims, I would have several hundred claims at any given time. It was not my practice to routinely notify all of the lawyers in the Wal-Mart legal team as to the lawyers the suppliers had engaged to defend products liability claims. I did not personally notify the lawyers handling tort claims that Rubbermaid had engaged Friday, Eldredge & Clark.

6. Over the past few years, whenever Wal-Mart has engaged counsel in Central Arkansas to defend a tort claim, Wal-Mart has engaged Steve Quattlebaum. Whenever given the opportunity to make recommendations to suppliers as to local counsel in Little Rock, I have recommended Steve Quattlebaum. In fact, I recommended that Rubbermaid hire Steve Quattlebaum as local counsel in the Ronald Hughes case, but Rubbermaid chose not to do so.

7. I have no recollection of ever speaking to any attorney at Friday, Eldredge & Clark regarding the Ronald Hughes lawsuit. After reviewing my work product related to this lawsuit, I am unable to find any documentation that would indicate that I or my support staff communicated directly with Friday, Eldredge & Clark

regarding this lawsuit. Our communication, both written and verbal, was with Mike Smith, a lawyer in Ohio.

8. The Carolyn Binns case was not under my area of responsibility. I was unaware that a lawyer with Friday, Eldredge & Clark was serving as a special justice in that case.

Further Affiant sayeth not.

/s/ Debbye Smith
Debbye Smith

STATE OF ARKANSAS)
)
COUNTY OF BENTON)

SWORN TO AND SUBSCRIBED BEFORE me, a Notary Public, by Debbye Smith on this 19th day of October, 2000.

/s/ Jolinn Deason
Notary Public, State of Arkansas

My Commission Expires:

OFFICIAL SEAL
JOLINN DEASON
NOTARY PUBLIC - ARKANSAS
BENTON COUNTY
My Commission Expires 01 01 2003

EXHIBIT 3

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC. **APPELLANT**

V. **No. 99-810**

CAROLYN BINNS **APPELLEE**

AFFIDAVIT OF DRU CESSNA

Dru Cessna, first being duly sworn, upon oath states of personal knowledge:

1. I am Dru Cessna. I am a lawyer employed by Wal-Mart Stores, Inc. Since April 1999, I have been responsible for managing products liability litigation, including the claim made by Ronald Hughes.

2. Wal-Mart's Vendor Agreement contains an indemnification provision whereby the supplier defends claims arising from the product it sells to Wal-Mart and assumes responsibility for judgments entered in those claims. When a products liability claim is made, Wal-Mart tenders the defense of the claim to the supplier of the product in question and demands that the supplier assume the defense and the responsibility for any judgment.

3. In the claim made by Ronald Hughes, the product at issue was manufactured by Rubbermaid. When suit was filed in Arkansas, summons and complaint were forwarded to Rubbermaid with a demand that Rubbermaid defend the suit and assume responsibility for any judgment. Rubbermaid accepted its responsibility under

the supplier agreement, and agreed to defend the suit and be responsible for any judgment.

4. Rubbermaid engaged the attorneys who defended that suit. Rubbermaid paid the attorneys who defended that suit. Wal-Mart did not engage anyone to defend that suit and did not pay any legal fees for the defense of that suit. Wal-Mart did not have any financial interest in that suit.

5. When I was handling products claims, I would have several hundred claims at any given time. It was not my practice to routinely notify all of the lawyers in the Wal-Mart legal term as to the lawyers the suppliers had engaged to defend products liability claims. I did not personally notify the lawyers handling tort claims that Rubbermaid had engaged Friday, Eldredge & Clark.

6. For as long as I have been employed by Wal-Mart, whenever Wal-Mart has engaged counsel in Central Arkansas to defend a tort claim, Wal-Mart has engaged Steve Quattlebaum. I am not aware that Wal-Mart has engaged Friday, Eldredge & Clark since I have been employed by Wal-Mart.

7. I have no recollection of ever speaking to any attorney at Friday, Eldredge & Clark regarding the Ronald Hughes lawsuit. After reviewing my work product related to this lawsuit, I am unable to find any documentation that would indicate that I or my support staff communicated directly with Friday, Eldredge & Clark regarding this lawsuit. Our communication, both written and verbal, was with Mike Smith, a lawyer in Ohio.

8. The Carolyn Binns case was not under my area of responsibility. I was unaware that a lawyer with Friday, Eldredge & Clark was serving as a special justice in that case.

Further Affiant sayeth not.

/s/ Dru E. Cessna
Dru E. Cessna

STATE OF ARKANSAS)
)
COUNTY OF BENTON)

SWORN TO AND SUBSCRIBED BEFORE me, a Notary Public, by Dru Cessna on this 19th day of October, 2000.

/s/ Sherry [Illegible]
Notary Public, State of Arkansas

My Commission Expires:

SHERRY PARRISH
NOTARY PUBLIC,
STATE OF ARKANSAS
BENTON COUNTY
My Commission Expires 11/30/04

EXHIBIT 4

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC. **APPELLANT**

V. **No. 99-810**

CAROLYN BINNS **APPELLEE**

AFFIDAVIT OF PATRICK F. HAGGERTY

Patrick F. Haggerty, first being duly sworn, upon oath states of personal knowledge:

1. I am a partner in the law firm of Frantz Ward LLP in Cleveland, Ohio. I was formerly a partner in the law firm of Thompson, Hine & Flory, LLP. I am attorney of record and lead counsel for the defense in *Ronald Hughes and Betty Hughes, Individually and as Next Friends and Co-Tutors of Bridgette Hughes, a Minor Child, v. Wal-Mart Stores, Inc.*, filed in the United States District Court for the Eastern District of Arkansas, Western Division, No. LR-C-98-552 (the "Hughes Case").

2. The plaintiff in the Hughes Case, Ronald Hughes, alleges he purchased a plastic gasoline container, manufactured by Rubbermaid, at a Wal-Mart Store in Louisiana. He initially filed an action in Louisiana against Rubbermaid and Wal-Mart. He obtained a dismissal of that action. He then filed the Hughes Case in Arkansas and named Wal-Mart as the sole defendant. A copy of the complaint in the Hughes Case is attached to this Affidavit as Exhibit 1.

3. Although I have not seen the agreement, it is my understanding that the agreement between Rubbermaid and Wal-Mart whereby Wal-Mart purchases products

from Rubbermaid requires Rubbermaid to defend any products liability claim against Wal-Mart arising from the sale of a Rubbermaid product and to indemnify Wal-Mart against any judgment arising from a products liability claim concerning a Rubbermaid product. When Wal-Mart was served with summons and complaint in the Hughes Case, Wal-Mart tendered the defense of the case to Rubbermaid.

4. Rubbermaid accepted tender of the defense.

5. Rubbermaid engaged me to defend the Hughes Case. I served as lead counsel for the defense of the Hughes Case. On behalf of Rubbermaid, I engaged Friday, Eldredge & Clark as local counsel. My firm took the lead in preparing all of the pleadings, motions, and briefs, and in conducting all of the discovery. I sent the pleadings, motions, and briefs to Kevin Crass of Friday, Eldredge & Clark for his review and signature, but Mr. Crass was not active in the defense of the case other than to sign and file pleadings on our behalf.

6. After discovery, we filed a motion for summary judgment contending that Louisiana law applied and barred claims against product suppliers such as Wal-Mart. The Honorable Harry Woods granted summary judgment. A copy of Judge Wood's opinion is attached hereto as Exhibit 2

7. The fees of Friday, Eldredge & Clark and my firm's fees have been paid by Rubbermaid or its insurers. Wal-Mart has not paid my firm's attorney's fees, nor am I aware of any fees paid by Wal-Mart to Friday, Eldredge & Clark, in the defense of the Hughes Case.

8. If a judgment in the Hughes case were to be entered, it is my understanding that the agreement provides that the judgment would be paid by Rubbermaid.

/s/ Patrick F. Haggerty
Patrick F. Haggerty

STATE OF OHIO)
)
COUNTY OF CUYAHOGA)

SWORN TO AND SUBSCRIBED BEFORE me, a Notary Public, by Patrick F. Haggerty on this 19th day of October, 2000.

/s/ [Illegible]
Notary Public, State of Ohio
MICHAEL E. SMITH, Attorney at Law
Notary Public – State of Ohio
My commission has no expiration date
Section 147.03 R.G.

My Commission Expires:

_____

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RONALD HUGHES and **BETTY HUGHES**
individually and as next friends and co-tutors of
BRIDGETTE HUGHES, a minor child

vs

WAL-MART STORES, INC.

COMPLAINT

(Filed Aug. 14, 1998)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COMES the plaintiffs, **Ronald Hughes** and **Betty Hughes** as next friends and co-tutors of **Bridgette Hughes** complaining of the defendant, **Wal-Mart Stores, Inc. "Wal-Mart"** or **"defendant,"** and for cause of action would respectfully show the court and jury the following:

1 That the jurisdiction of this Court attaches under the provisions of 28 U.S.C. §§1332, in that the amount in controversy, exclusive of interest and costs, is greater than the sum of Seventy-Five Thousand and No/100 Dollars ($75,000), and the parties are citizens of different states.

2 That plaintiffs including young Bridgette Hughes is/are citizen(s) of the State of **Louisiana** and reside in **Homer, Claiborne Parrish, Louisiana.**

3 That defendant, **Wal-Mart Stores, Inc.** is a corporation duly organized and incorporated under the laws of the State of **Delaware** and having its principle place of business in **Arkansas.**

4 That this is a **products liability** cause of action which arises from design, manufacturing and marketing defects of a **fuel container** designed, manufactured and marketed by **Rubbermaid Specialty Products, Inc.** or other affiliated corporate entities and sold by

5 Defendant Wal-Mart Stores, Inc. named hereinabove and purchased by plaintiffs.

6 That at all times mentioned herein, defendant was/were engaged in the business of marketing and selling **fuel containers** to the general public.

7 That plaintiffs individually and on behalf of Bridgette Hughes bring this lawsuit to recovery damages arising out of an incident that occurred on **December 26, 1993.** On that date plaintiff **Bridgette Hughes,** then age 6, was playing in the front yard at the residence of a family friend, Jack Spurlock, Athens, Louisiana, as her father, **Ronald Hughes,** was burning tree stumps at another site in the yard. While burning stumps **Ronald Hughes** would pour diesel fuel from the **fuel container** purchased from defendant(s) on the stump and then burn the stump. During the stump-burning operation the **fuel container** in **Ronald Hughes** hands suddenly and without warning ignited and exploded. The **fuel container** and its contents together created a phenomena known as the **flamethrower effect,** whereby the **fuel container** emitted a flame, appearing like a flamethrower, that reached out a distance of more than 40 feet and engulfed **Bridgette Hughes** in flames. As a result, **Bridgette Hughes** suffered severe injuries which will effect her for the rest of her life.

8 That Defendant is/are **strictly liable** to plaintiffs for marketing and selling the **fuel container** which was unreasonably dangerous for its reasonably

foreseeable uses because of the following design, manufacturing and marketing defects, each of which was a producing and/or proximate cause of the occurrence in question:

8.1 That the **fuel container** in question was defective because it failed to **design** against the hazard of an ignition of the contents by an external heat source and the resulting phenomena known as the "flamethrower effect."

8.2 That the Fuel container in question was defective because it failed to **guard** against the hazard of ignition of the contents by an external heat source and the resulting phenomena known as the "flamethrower effect."

8.3 That the Fuel container in question was defective because it failed to **adequately warn** against the hazard of ignition of the contents by an external heat source and the resulting phenomena known as the "flamethrower effect."

9 That defendant was **negligent and careless** in the marketing of the **fuel container** in question. Defendant knew, or in the exercise of ordinary care should have known, that the **fuel container** was defective and unreasonably dangerous to those persons likely to use the product for the purpose and in the manner for which it was intended to be used. Defendant was negligent and careless in the particulars set forth in this and the preceding paragraphs and such negligence and carelessness was a proximate cause of the occurrence in question.

9.1 That defendant knew, or in the exercise of ordinary care should have known, of the means of marketing and selling **fuel containers** equipped with inexpensive and feasible safety features such as **flame and/**

or flashback arresters, spring-loaded caps, explosion vents and/or safety vents.

9.2 That defendant had actual knowledge, of the means of marketing and selling such a **fuel container** with such **flame and/or flashback arresters, spring-loaded caps, explosion vents and/or safety vents** which would have prevented the occurrence in question.

9.3 That notwithstanding this knowledge, defendant marketed and sold the **fuel container** in question without these safety features available to prevent occurrences such the occurrence in question.

9.4 That defendant owed Bridgette Hughes a duty of reasonable care when it marketed and sold the **fuel container** in question. Defendant violated its duty and was negligent and careless in the particulars set forth above.

10 That each of the above-mentioned acts or omissions was a proximate cause of the injuries suffered by the Bridgette Hughes.

11 That each of the above and foregoing acts or omissions of defendant were more than momentary thoughtlessness, inadvertence, or error of judgment. Such acts or omissions constituted such an entire want of care as to establish that they were the result of actual conscious indifference to the rights, welfare or safety of the plaintiffs and persons affected by it, and as such gross negligence. Plaintiffs are entitled to recover judgment against defendant for exemplary damages for such gross negligence, heedless, and reckless disregard of plaintiffs rights.

12 That defendant by and through the marketing and sale of the product in question, **expressly and impliedly warranted** to the public generally, and to

the plaintiffs specifically, that the **fuel container** was fit for the purposes for which it was intended.

12.1 That the Hughes family, including Ronald Hughes, made use of the product as alleged herein, and relied on the express and implied warranties. Contrary thereto, the **fuel container** was not fit for its intended use, rendering the product in question unreasonably dangerous.

12.2 That defendant breached the express and implied warranties by the marketing and sale of the defective **fuel container** as alleged above.

12.3 That defendant's breach of warranties and the above-mentioned defects rendered the product unreasonably dangerous and a proximate cause and producing cause of the occurrence in question and the resulting injuries suffered by the Bridgette Hughes. Further defendant's conduct was done knowingly.

13 That as a direct result of the incident described above, Bridgette Hughes suffered severe personal injuries, including burns and disfigurement. These injuries are permanent in nature. **Bridgette Hughes** and plaintiffs have suffered great physical pain and mental anguish due to such injuries in the past and in reasonable probability will continue to suffer physical pain and mental anguish in the future.

13.1 That as a result of these injuries, the Bridgette Hughes has been physically impaired and disfigured and will continue to be so impaired and disfigured in the future.

13.2 That as a result of the injuries Bridgette Hughes has incurred medical expenses and in reasonable probability will continue to incur such expenses in the future.

13.3 That as a result of the injuries **Bridgette Hughes** has suffered a loss of earning capacity and in reasonable probability will continue to suffer such loss in the future.

14 That as a result of the personal injuries and economic damages set out in the foregoing paragraphs, the plaintiffs including Bridgette Hughes have been damaged in the sum of at least Twenty Million and No/100 Dollars (**$20,000,000.00**).

15 That defendant's negligence and carelessness as set out above, was of such character as to make the defendant guilty of gross negligence. The defendant's actions constitute heedless, reckless, wanton disregard and conscious indifference to the rights, welfare, and safety of **Bridgette Hughes** and the foreseeable users of the **fuel container** for which defendant is liable for exemplary damages.

WHEREFORE, Bridgette Hughes pray that the defendant **Wal-Mart Stores, Inc.** be duly cited to appear and answer this complaint and that upon a final trial of this cause before a jury, Bridgette Hughes recover:

1. Judgment against the defendant for Bridgette Hughes' damages as set forth above in the sum of at least Twenty Million and No/100 Dollars (**$20,000,000.00**);

2. Exemplary damages against the defendant for Bridgette Hughes' damages as set forth above in a sum four times the actual damages;

3. Prejudgement interest on Bridgette Hughes' damages as allowed by law;

4. Interest on the judgment at the legal rate from date of judgment;

5. Reasonable attorney's fees as may be allowed by law;

6. Costs of suit; and,

7. Such other and further relief to which Bridgette Hughes may be entitled.

Respectfully submitted,

JOHNSON & ASSOCIATES
Fritz Building
1101 Scott Avenue Ste. 17
P.O. Box 8185
Wichita Falls, TX 76307-8185
(940) 761-3344
FAX (940) 761-3355

BY: /s/ James A. Rasmussen
James A. Rasmussen
TX Bar No. 16554300
Charles E. Perry
TX Bar No. 15799700
Gary Southard
TX Bar No. 18859500

Of Counsel:

Alfred E. "Tom" Thompson
MURPHY, POST, THOMPSON & ARNOLD
1141 E. Main St., #302
Batesville, AR 72501-3016
(870) 793-3821

Jury Demand

Plaintiffs, named herein individually and on the behalf of Bridgette Hughes, as permitted by law, the local rules of this court and the Federal Rules of Civil Procedure respectfully request the right to a trial by jury before this Honorable Court.

/s/ James Rasmussen

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RONALD HUGHES, individually and as next friend and co-tutor of Bridgette Hughes, a minor — **PLAINTIFF**

VS. — **LR-C-98-552**

WAL-MART STORES, INC. — **DEFENDANT**

ORDER

(Filed Feb. 22, 2000)

Plaintiff Ronald Hughes purchased a plastic gasoline container manufactured by Rubbermaid at a Wal-Mart store in his home state of Louisiana. It is undisputed that Wal-Mart was the distributor of the gas can in issue, but was not the manufacturer.

While Hughes was using the gas can burning stumps in his yard, an accident occurred in which Hughes' six-year-old daughter Bridgette was severely burned. According to allegations in the Complaint, the accident was caused by a defect in the design of the gas can. Specifically, the plaintiffs allege that the can lacked an inexpensive safety device to prevent flames outside the can from being sucked into the can causing an explosion.

Although all plaintiffs are residents of the State of Louisiana, this Court has jurisdiction over this case, and venue is proper because the defendant, Wal-Mart, Inc.,

has its principle place of business in Arkansas. The question currently before the Court is whether the law of the State of Louisiana should apply to this case or whether the law of the State of Arkansas should apply. The answer to this question will be dispositive of the case. Under Louisiana law, the supplier of a defective product is not liable unless the supplier had a duty to warn of the defect and failed to do so.

> . . . "[The Louisiana Products Liability Act] defines a 'seller' as 'a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value.' La.R.S. 9:2800.53(2). A non-manufacturing seller who does not vouch for the product by holding it out as his own does not incur strict manufacturer's liability under the LPLA, but is responsible for damages in tort 'only if he knew or should have known that the product sold was defective, and failed to declare it.' "

Slaid v. Evergreen Indemnity, Ltd., et al., 745 So.2d 793, 797 (La.App. 2d Cir. 1999), quoting *Wilson v. State Farm fire & Cas. Ins. Co.*, 654 So.2d 385, 387 (La.App. 3d Cir. 1995). Louisiana further provides that, "a non-manufacturing seller is not required to inspect a product prior to sale to determine the possibility of inherent vices or defects." *Slaid*, 745 So.2d at 797, quoting *Harris v. Atlanta Stove Works*, 428 So.2d 1040, 1043 (La.App. 1st Cir.1983).

Under Arkansas law, an injured plaintiff can recover from a supplier of a defective product. Such a supplier is able, in turn, to recover from the manufacturer of the defective product. There is sound reasoning behind the

Arkansas law. An injured plaintiff, such as the severely burned child in this case, can recover from any supplier in the chain of supply and leave the suppliers, distributors, and manufacturers (who are theoretically in a better position to shoulder the financial burden of an injury) to sort out issues of contribution and indemnity. The burden on a single supplier is further reduced by that supplier's right to implead third parties, such as their suppliers or the manufacturer of the defective product, so that issues of contribution and indemnity can be decided in the main case.

Under Arkansas conflict law, a court is to consider five choice-influencing considerations in deciding what law should apply in a particular case. *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977). Those factors are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law. *Id. at 456.*

In this case, only the last two factors are relevant. Generally, a forum's governmental interests hinge on the protection of its injured citizens and the economic impact of those injuries on the rest of the state's citizens. In this case, the plaintiffs are residents of the State of Louisiana. Arkansas has little, if any, governmental interest involved in the litigation of the Hughes's claims. Not only are the plaintiffs Louisiana residents, but they purchased the allegedly defective product in Louisiana, and the accident occurred in Louisiana.

Plaintiffs argue that Arkansas has the better rule of law. Certainly, the argument can be made that Arkansas's policy of allowing an injured plaintiff to secure recovery from either the direct seller, the distributor, or the manufacturer has much to commend it. However, the Louisiana statute does not leave the injured plaintiff without a remedy. The injured plaintiff has a cause of action against the manufacturer of a defective product.

For these reasons, the court finds that Louisiana law should apply to the seller's liability in this case. This being so, the defendant is entitled to summary judgment. The defendant's motion for summary judgment (doc # 8) is, accordingly, granted.

DATED this 22 day of February, 2000.

/s/ Henry Woods
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 2-23-00 BY [Illegible]

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Post Office & Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

February 23, 2000

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:98-cv-00552.

True and correct copies of the attached were mailed by the clerk to the following:

Kip T. Bollin, Esq.
Thompson, Hine & Flory, LLP
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Cleveland, OH 44114-1216

Patrick F. Haggerty, Esq.
Thompson, Hine & Flory, LLP
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Kevin A. Crass, Esq.
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Alfred F. "Tom" Thompson III, Esq.
Murphy, Post, Thompson, Arnold & Skinner
Post Office Box 2595
Batesville, AR 72503-2595

cc: press
post

Date: 2/23/00

James W. McCormack, Clerk
BY: /s/ [Illegible]

EXHIBIT 5

IN THE SUPREME COURT OF ARKANSAS

WAL-MART STORES, INC.

APPELLANT

V. **No. 99-810**

CAROLYN BINNS

APPELLEE

AFFIDAVIT OF DENNIS KINNEY

Dennis Kinney, first being duly sworn, upon oath states of personal knowledge:

1. I am Dennis Kinney. I am a lawyer employed by Wal-Mart Stores, Inc.

2. When Wal-Mart received the Petition for Vacatur in this case, I was asked to make an inquiry among the lawyers employed by Wal-Mart and to search Wal-Mart's payment records in an effort to ascertain whether Wal-Mart has engaged Friday, Eldredge & Clark or made payments to Friday, Eldredge & Clark in the past few years. I found payments to Friday, Eldredge & Clark in 1998 in connection with an employment discrimination case in which Friday, Eldredge & Clark represented an employee of Wal-Mart. Wal-Mart was represented in that action by a lawyer from another firm. I have found two products liability cases in which Friday, Eldredge & Clark was engaged by the manufacturers and paid by the manufacturers. One was a case in which the product was a gun. That case was closed in the Wal-Mart system on February 10, 2000. The other case was in Crawford County. The product was a tire. That case was closed in the Wal-Mart system on December 11, 1997. Wal-Mart did not pay any fees to Friday, Eldredge & Clark in either of those two cases.

3. Since 1995 the only case I found in which Wal-Mart engaged Friday, Eldredge & Clark to represent Wal-Mart was *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 891 S.W.2d 30 (1995).

Further Affiant sayeth not.

/s/ Dennis Kinney
Dennis Kinney

STATE OF ARKANSAS)
)
COUNTY OF BENTON)

SWORN TO AND SUBSCRIBED BEFORE me, a Notary Public, by Dennis Kinney on this 19th day of October, 2000.

/s/ Nancy J. Waskowich
Notary Public, State of Arkansas

My Commisison Expires:

OFFICIAL SEAL
Nancy J. Waskowich
Notary Public Arkansas
Benton County
My Commission Expires 6-18-2003